(1) Supreme Court, U.S.

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

STATE ENGINEERING ASSOCIATION, *et al.*

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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38p.

QUESTIONS PRESENTED

1) Whether the assets and earnings of the Wisconsin Retirement System are the "private property" of participants in the Wisconsin Retirement System for purposes of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

2) Whether the judicial abandonment or recasting of well established private property rights, properly voids the Constitutional protections of the Fifth and Fourteenth Amendments to the United States Constitution as to the taking of such private property without just compensation and without due process of law.

3) Whether the challenged provisions of 1999 Wisconsin Act 11 take the private property of participants in the Wisconsin Retirement System without just compensation and without due process of law.

4) Whether the challenged provisions of 1999 Wisconsin Act 11 impair the contract between participants and the State of Wisconsin in violation of Article I, § 10 of the United States Constitution.

LIST OF PARTIES

The Petitioners to the original action before the Supreme Court of the State of Wisconsin were: the State Engineering Association, by its President, Thomas H. Miller, David Buschkopf, Ross Johnson, Melvin Sensenbrenner, Bernard Kranz and Thomas H. Miller (Petitioners herein); and the Wisconsin Professional Police Association, Inc., John Charewicz, David Mahoney, Susan Armagost, and Steven Urso (Collectively, "WPPA"). The Respondents in the original action were: George Lightbourn, Acting Secretary of the Wisconsin Department of Administration, Jack C. Voight, Wisconsin State Treasurer (collectively, "State Respondents"); and the Wisconsin Education Association Council, by its President, Terry Craney and its Vice-President, Stan Johnson, and Donald Krahn, Margaret Guertler, Gerald Martin, and Phyllis Pope (Collectively, "WEAC Respondents").

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Public Employee Pensions in Times of Fiscal Distress, Harv.L.Rev. 992, (1977) 14

OPINIONS BELOW

The Opinion of the Wisconsin Supreme Court is reported at 2001 WI 59, 627 N.W.2d 807 (2001), *motion for reconsideration denied*, 2001 WI 114 (July 18, 2001). App. 1, 100. This was an original action before the Wisconsin Supreme Court.

JURISDICTION

The Wisconsin Supreme Court decision was issued June 12, 2001; a timely Motion for Reconsideration was filed July 2, 2001. Reconsideration was denied on July 18, 2001.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Article I, § 10 of the United States Constitution provides in relevant part that "No state shall ... pass any ... law impairing the obligation of contracts...."

Relevant statutory provisions, including Sections

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[1]The Motion for Reconsideration was filed pursuant to § 809.64, Stats. which replaces former Rules 251.65, 251.67 to 251.69, which provided for motions for rehearing. ... The term "reconsideration" is used because in cases decided without oral argument there has been no initial hearing. Section 809.64, Wis. St. Ann.

27(1)(a) and (1)(b)1 of 1999 Wisconsin Act 11, and Wisconsin Statute §§ 40.01, 40.015, 40.02(7), 40.02(23)(a), 40.03(1), 40.04(3)-(6), 40.05, 40.19(1), 40.23(2m)(b) and (e), are lengthy, and are therefore included in Petitioner's Appendix pursuant to S.Ct. Rule 14.1(f).

STATEMENT OF THE CASE

The present action was heard by the Wisconsin Supreme Court, exercising original jurisdiction, on a record comprised of stipulated facts and exhibits. Relevant facts and exhibits are included in Petitioners' Appendix and cited herein as "App. __".

Petitioners include "Participants" in the Wisconsin Retirement System (the "WRS"), "Annuitants", and a labor organization representing Participants. App. 229-30. Petitioners challenged the constitutionality of a number of provisions of Wisconsin Assembly Bill 495 (1999 Wisconsin Act 11, hereinafter, "Act 11"). This Petition seeks review of portions of the Wisconsin Supreme Court's decision holding that Sections 27(1)(a) and (1)(b)1 of Act 11 are constitutional, and do not take the private property of WRS Participants/Annuitants for a public purpose without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution or impair the contract rights of WRS Participants in violation of Article I, § 10 of the United States Constitution. App. 79-80.

The Federal questions herein were raised by Petitioners in their Complaint, briefs, and Motion for Reconsideration; such questions were both implicitly and explicitly addressed in the Wisconsin Supreme Court's decision. App. 78-79, 80-81, 194, 209, 224-25, 226. *See, also,* App. 60 n. 180.

A. Summary of Procedural History and Decision.

1. The present action was commenced on December 22, 1999, when the fiduciaries of the WRS Trust Fund (the "Fiduciaries") filed a Petition for Leave to Commence an Original Action in the Wisconsin Supreme Court challenging the constitutionality of a number of sections of Act 11, and

seeking to have such unconstitutional provisions severed from the remaining portions of Act 11 prior to its implementation. App. 164. The relevant portions of the original Petition alleged that Sections 27(1)(a) and 27 (1)(b)1. of Act 11 violate the takings and contract clauses of the United States Constitution App. 184.

2. Motions to intervene by Petitioners, the WPPA, and the WEAC Respondents were granted by the Wisconsin Supreme Court. App. 34.

3. The sections of Act 11 at issue in this Petition direct that $200 million of WRS assets that would otherwise be used to purchase annuities for Participants be diverted to a credit account and used to pay financial obligations of participating employers. App. 29-30, 121-22. The sole purpose of the legislation was to provide the State of Wisconsin with budgetary relief. App. 75.

4. By Order dated February 10, 2000, the Wisconsin Supreme Court dismissed the Petition for leave to file an original action filed by the Fiduciaries, holding that all the Fiduciaries were either public officers or state agencies, and therefore, could not challenge the constitutionality of a duly enacted statute of the State of Wisconsin. The ETF Parties later filed a motion for leave to file an *amicus curiae* brief. Said motion was denied, thus depriving these fiduciaries of any ability to participate in this action in any capacity. App. 94-95 n. 1.[2]

5. The parties entered into a stipulation of facts which was submitted to the Wisconsin Supreme Court, which then posed certain additional questions to the parties including: what was each party's position as to whether the "Trust Fund, as changed

[2]In its decision, the Wisconsin Supreme Court stated: "...the ETF Board would stand as a bulwark of fiduciary responsibility to protect the security of the fund" from future larger legislative grabs at Trust Fund assets. The Court was silent as to how the ETF Board fiduciaries could protect any future legislative grab, given their inability to commence or to participate in litigation.

by the subject legislation, will be actuarially sound." App. 249.

6. All parties responded to the questions posed by the Wisconsin Supreme Court. The Petitioners herein responded, in relevant part, as follows:

> .... SEA's [(Petitioner's)] position on this point cannot be adequately answered with a "yes" or "no".
>
> The SEA Petitioners do not take the position that the provisions of AB 495, in and of themselves, leave the Trust Fund in a financially troubled condition, now or in the future. Notwithstanding this statement, the SEA Petitioners believe, and intend to argue, that AB 495 poses a systemic threat to the Trust Fund. If Trust Fund assets may be used to meet non-trust obligations, then the substantial assets of the Trust Fund are at risk for future legislative conversions that could threaten the solvency and actuarial soundness of the Trust Fund. The very ability to remove dollars from the Trust Fund either directly or indirectly, for purposes other than paying benefit commitments associated with those funds, poses a significant danger to the future and security of the Trust Fund. Whether this concern fits within the parameters of the term "actuarial soundness" can perhaps be argued, but SEA is concerned about stipulating to the use of a term without a clear definition of what that terms may mean under Wisconsin law.
>
> SEA Petitioners do not believe that the proper test under a takings analysis can be whether the Trust Fund remains able to meet its benefit commitments to Participants after a particular taking. Participants have a vested interest in their retirement system that extends to the WRS as a whole. Association of State Prosecutors v.

> Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888 (1996). An improper taking from the Trust Fund does not become legally appropriate if sufficient funds remain to pay the obligations and benefit commitments of the Trust Fund. Using the Trust Fund as a ready source of cash to meet the State's budgetary cash flow needs or as a fund from which employers are free to drain existing cash reserves is constitutionally flawed without regard to whether the remaining funds are sufficient to meet benefit commitments.

App. 250-51.

7. On May 25, 2000, the Court took original jurisdiction of the present case. App. 35. In its Order, the Court adopted the stipulated facts and exhibits submitted by the parties through Judge Barron, and added that the stipulation "shall be construed to include the finding that the Trust Fund, as changed by the subject legislation, will be actuarially sound subject to the qualification[s]" contained in the SEA Petitioners' letter quoted above. App. 135-36.

8. On June 12, 2001, the Wisconsin Supreme Court denied Petitioners' prayer for relief and declared the challenged sections of Act 11 to be constitutional. App. 91-92. In reaching its decision, the Wisconsin Supreme Court stated as follows:

> Once contributions enter the employer reserve, they no longer belong to employers and may not be reclaimed by employers. They are assigned to participants. Non-annuitant participants have the right to block improper diversions from the employer reserve and to protect the integrity and security of the employer reserve so that benefit commitments will be fulfilled. Non-annuitants have an individual property interest to the full extent of their benefit commitments.

***

> While the $200 million employer credit is likely to affect the balance in the employer reserve, we see no evidence that the credit here will damage the property interests of non-annuitant participants. It does not "take" their property. All money in the employer reserve remains in the reserve and will go toward funding future benefits. No non-annuitant participant will receive less from the employer reserve than Chapter 40 requires. Speculation about how benefits might be increased in the future does not outweigh the legislature's right to amend the provisions of Chapter 40 to reduce employer costs on a temporary basis, provided the WRS remains secure.

***

> [Petitioners'] argument[s] overlook[] the distinction between taking money out of a fund held in trust for participants, and suspending payment of money into a fund before the employers' property interest has transferred.

App. 79, 80.

9. Three of seven Justices dissented with regard to the constitutional propriety of the $200 million credit, finding it to be an unconstitutional taking of WRS Participants' property and contract rights. The Chief Justice wrote as follows:

> The monies held in the Employe Trust Fund (ETF) have been irrevocably placed in trust for the benefit of the retirement system participants, and the State cannot direct that such monies be used for non-ETF purposes. The $200 million employer contribution credit, as Justice Bablitch also explains, is a diversion of $200 million of ETF monies in which retirement system

participants have a protected property and contract right.

This diversion is an unlawful taking and an impairment of contract, as well as a violation of trust principles. The Wisconsin and federal constitutions do not allow the legislature to balance the state budget or shift resources among governmental entities by using assets belonging to the ETF. Promises to contribute to the fund are assets belonging to the ETF. As a result of the majority opinion, Wisconsin now unfortunately joins other states that have viewed their once-burgeoning pension funds as sources of budget relief.

App. 95.

Justice Bablitch wrote as follows:

I join the majority opinion with the exception of part IV.D. regarding the $200,000,000 credit given to employers. This credit is a forgiveness of a debt owed by employers to the Wisconsin retirement system (WRS). It is not the state's to forgive. The state is not the owner of this debt; the employees are. Accordingly, I respectfully dissent to this part of the majority opinion.

***

Prior to the legislation, state and municipal employers either owed or will owe $200,000,000 into the WRS. This legislation forgives this past and future debt. Accordingly, the WRS will have $200,000,000 fewer assets available to it when future employee benefits or contributions are considered.

This $200,000,000 of debt, past or future, is not the legislature's money to use to balance their

> budget, relieve property taxes, or the like. This money belongs to the employees.
>
> Is this an unconstitutional taking? Of course.
>
> ***
>
> There is now $200,000,000 less in the system than there would have been. That seems to be a taking under anybody's definition.
>
> This is woefully bad precedent. To allow the legislature to take assets from the retirement system which belongs to the employees and use it for a purpose other than the employees without so much as a "by your leave," which is of course what happened here, potentially opens the floodgates to great mischief. We have previously warned of the dangerousness of such precedent.
>
> ***
>
> No amount of words can paper over the end result here. The employers are $200,000,000 richer because they no longer have a $200,000,000 obligation; the employees are $200,000,000 poorer because they no longer have available to them, either now or in the future, that money for potential benefits. I respectfully dissent.

App. 92-94 (citations omitted).

10. The SEA Petitioners filed a Motion for Reconsideration which was denied by Order dated July 18, 2001. App. 100.

B. THE WISCONSIN RETIREMENT SYSTEM ("WRS")

1. Establishment and Purpose of the Wisconsin Retirement System — a Public Employee Trust Fund.

The Wisconsin Retirement System ("WRS") was established pursuant to Chapter 40, Stats. The WRS is funded through the public employe trust fund (hereinafter, "Trust Fund") created by § 40.01, Stats. App. 142.[3] The purpose of the Trust Fund is to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident. App. 102, 142. The WRS is administered by the Department of Employe Trust Funds ("DETF") and its appointed secretary under the direction and supervision of the Employe Trust Funds Board ("ETF Board") and each member of the ETF Board is a trustee of the Trust Fund. App. 103, 142. There are approximately 1230 participating public employers, including state agencies, counties, cities, municipalities, school districts, etc.; ninety percent of all public employees in Wisconsin are covered by the WRS, totaling in excess of 243,000 employees. App. 270-72.

The purpose of the Trust Fund is codified in § 40.01(2), Stats., which provides in relevant part as follows:

> The public employe trust fund is a public trust and shall be managed, administered, invested, and otherwise dealt with **solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose**.

App. 102, 142 (emphasis added).

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[3]Unless otherwise noted, all statutory references are to the 1997-98 volumes of the Wisconsin Statutes.

2. The Fixed Retirement Investment Trust (FRIT) and Its Reserves and Accounts

Within the Trust Fund there is a fixed retirement investment trust ("FRIT") where funds to fulfill the purposes of the Trust Fund are deposited. App. 106, 149-52. Three of the reserves and one account within FRIT are of principal significance to understanding the effects of Act 11: (1) the employee accumulation reserve account; (2) the employer accumulation reserve account; (3) the annuity reserve account; and (4) the transaction amortization account. App. 106-07.

(a) The Employee Accumulation Reserve (Employee Reserve)

Employee required contributions are credited to the employee reserve, and each participant has a separate account reflecting contributions and investment earnings credited to each participant. App. 106, 152-56, As of Dec. 31, 1999 the employee reserve balance stood at approximately $10,962,298,421. App. 273.

(b) The Employer Accumulation Reserve (Employer Reserve)

The employer reserve is a single merged account into which all employer required contributions and investment earnings on those contributions are deposited on a pooled basis (no separate accounts). App. 106-07, 156-57. This is reflective of the fact that employers do not retain any legal or beneficial interest in such funds. App. 79. The employer reserve is used to fund annuities and in calculating necessary contributions. As of Dec. 31, 1999 the employer reserve balance stood at approximately $13,435,380,598. App. 107, 273.

(c) The Annuity Reserve

The annuity reserve is the account into which sufficient funds are transferred from the employer and employee reserves to fund specific annuities at the time of their inception. These amounts, together with future earnings, are used to fund

annuities. App. 106-07, 157, As of Dec. 31, 1999 the annuity reserve balance stood at approximately $16,496,442,528. App. 107, 273.

(d) The Transaction Amortization Account ("TAA").

The TAA, created by § 40.04(3), Stats., accounts for realized and unrealized gains and losses from the Fixed Retirement Investment Trust's investments. App. 106-07, 149-52. Each recognition of earnings from the TAA is distributed pro rata to the other FRIT reserves and accounts. App. 108, 109, 150. By stretching the realization of investment gains and losses, the TAA tends to stabilize necessary contribution rates. As of Dec. 31, 1999 the TAA balance stood at approximately $13,910,154,943. App. 107, 273.

3. Employer and Employee Contributions and Unfunded Prior Service Liability

(a) Employee Required Contributions

Employee required contributions to the Trust Fund are comprised of essentially two components: (1) the basic required contributions set by statute as a percentage of a participating employee's earnings; and (2) benefit adjustment contributions necessary to maintain the financial balance of the WRS (changes in contribution rates are apportioned equally between the employer-required contribution rate and the benefit adjustment contribution rate). Thus, subsequent changes to contribution rates are split evenly between employers and employees. App. 111.

(b) Employer Required Contributions

Employer required contributions consist of essentially two components: (1) current service contribution rates, are assessed against all participating employers. The WRS consulting actuary annually evaluates the funding requirements for the WRS. The employer annual contribution rate is calculated to meet the costs of estimated future retirement

benefits for Participants ("normal costs"), net of all revenues received from the statutory employee required contributions, the benefit adjustment contributions and those investment earnings credited as current income. Such contribution rates, upon ETF Board approval, become effective each January and represent the routine employer contribution requirements for the WRS. App. 112; (2) employer obligations for unfunded prior service liabilities ("unfunded liability"). App. 114, 157. An employer's unfunded liability is the result of an employer electing to grant WRS service credits to its employees for services rendered by the employees before the employer joined the WRS as a participating employer. Elections to provide such prior service credits result in unfunded liability debt owed by the employer to the WRS. These unfunded liabilities increase when improvements in WRS retirement benefits are authorized and made applicable to prior service credits. App. 114.

Employer contribution rates for the payment of unfunded liability are amortized over 40 years. An employer must continue to make contributions toward its unfunded liability, plus interest at the assumed rate (§ 40.05(2)(b), Stats.), until the entire debt has been paid to the WRS. App. 114-15, 157-58. Wisconsin's Attorney General has concluded that there is no statutory authority for the ETF Board to adjust employer unfunded liability balances based on subsequent changes in the actuarial assumptions used to calculate employer contribution rates. App. 235-47. Wisconsin Statutes specifically authorize employers to pay-off their unfunded liability in advance. App. 114-15, 157-58.

4. WRS Retirement Benefits

The WRS provides two retirement plan options: the formula benefit retirement plan, (a defined benefit plan), and the money purchase retirement plan, (a defined contribution plan). Both types of benefits are calculated and Participants are entitled to receive the greater of the two. App. 103-04, 160.

C. ACT 11 CHANGES TO WRS

1. $4 Billion Recognized from the TAA

Act 11 provides that $4 billion from the TAA is to be recognized and distributed to the other FRIT reserves and accounts on a pro-rata basis. Accordingly, most of the $4 billion is distributed to the employer, employe and annuity reserves. App. 121-22, 137.

2. Creation of a $200 Million Credit

Act 11 mandates the establishment of a $200 million credit within the employer reserve to be divided into individual credit accounts for participating employers on a pro rata basis. These individual credits are then to be used to pay the employer's required unfunded liability payments or, if none are owed, to pay the employer's required current service contributions. After an employer's credit is consumed, the employer is required to resume making full unfunded liability payments and required employer contributions. App. 122, 137-38.

WHY THE PETITION SHOULD BE GRANTED

More than two decades ago, a commentator observed:

> With public employee pension systems absorbing an increasingly large share of state and local revenues, financially troubled governments have begun increasingly to look to these systems as a source of fiscal relief. In some instances, legislatures have sought directly to alter the benefit eligibility structure of a government's pension program; in others, legislatures have sought to influence the fund's investment in government obligations..... Whatever their form, such efforts clearly call into question the protection to be afforded to the public employee in his pension.

Public Employee Pensions in Times of Fiscal Distress, 90 Harv.L.Rev. 992, 993 (1977).

Another commentator has observed that state pension funds are tempting sources of money for State legislatures as an alternative to raising taxes:

> Legislators who want to spend more money than is available prefer to obtain the difference by a method other than raising taxes. Pension trusts for public employees are especially inviting because they frequently have substantial assets. The current trend is to make indirect removals. Approaches include terminating all or part of the plan; reducing benefits; and, suspending, postponing or reducing contributions by the employer.

A Skunk at a Garden Party: Remedies for Participants in State and Local Pension Plans, 79 Denv. U.L. Rev. 507 (1998).

The notorious bank robber, Willie Sutton, when asked why he robbed banks, purportedly answered: "because that is where the money is." For state legislatures, public pension funds are where the money is and, increasingly, perceived short-term fiscal needs are trumping the property rights and long-term retirement security interests of public employees.

In Wisconsin, the legislature has made a number of attempts to tap into the substantial assets of public pension trusts. Prior to the present case, the Wisconsin Supreme Court has, always unanimously and consistently, invalidated all such direct and indirect legislative attempts. *See, e.g.*, Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 18, 558 N.W.2d 83, 90 (1997), Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 558, 544 N.W.2d 888, 892 (1996), State ex rel. Canon v. Moran, 111 Wis.2d 544, 331 N.W.2d 369 (1983), State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 10, 106 N.W.2d 301 (1960). Previously, the Wisconsin Supreme Court has uniformly held that the assets and earnings of the WRS are

irrevocably held in trust for WRS Participants, that participants have a vested property interest in the assets and earnings of their public pension system that cannot be taken without just compensation and due process of law, and that the assets and earnings of WRS or other public pension can only be used as expressly authorized by statute. *Id.*

This Court has held that a State may not sidestep the takings clause by disavowing property interests long recognized under state law. Phillips v. Washington Legal Foundation et al., 524 U.S. 156, 167 (1998), *See, also,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). The Wisconsin Supreme Court's decision in the present case represents a radical departure from a long line of precedent protecting the assets and earnings of the WRS, and disavows property rights that are well established under Wisconsin law.

The decision of the Wisconsin Supreme Court is erroneous, conflicts with decisions of this Court, and violates property and contract rights embodied in well settled trust principles. It contributes to a proliferating conflict among state courts concerning constitutional protections related to public pension system assets.

I. CONFLICTS CONCERNING THE PROPERTY AND CONTRACT RIGHTS OF PARTICIPANTS IN PUBLIC PENSION SYSTEMS.

In a radical departure from precedent, a sharply divided Wisconsin Supreme Court held that the vested property and contract rights of WRS Participants is limited to their benefit commitments, and does not extend to the assets and earnings contained in the WRS Trust Fund. The conflict between the justices in the present case mirrors the sharp division that has emerged on this issue among state courts.

In New York the Court invalidated legislation that created a similar credit account that depleted assets of public retirement systems and provided funding as benefits accrued. The mandated change was designed for the sole purpose of

providing the state with budgetary relief, and used the savings generated by the alternate funding method to create a credit for public employers to be used to pay future required employer contributions. The Court invalidated the legislation, stating as follows:

> In sum, chapter 210 impairs the benefits of the existing pension fund. Said legislation allows employers to deplete moneys in the existing pension fund by reducing the amount of employer contributions. Employers are allowed a credit of a portion of the existing moneys, and need not contribute to the pension until the reserved moneys are drastically reduced. To later replenish the fund, employers and employees must increase the amount of their contributions to the pension fund. As such, the reserve moneys will not be available for immediate investment, the return on investment of moneys in the existing fund will be significantly decreased, and the additional security provided by the reserve moneys in the pension funds will be impaired.

McDermott v. Regan, 82 N.Y. 2d 354, 363, 624 N.E. 2d 985, 989-90 (1993).

Courts in the states of West Virginia, California, Washington and Pennsylvania have held that participants have a vested interest in the underlying assets of their pension system. Dadisman v. Moore, 181 W.Va. 779, 790-91, 384 S.E.2d 816, 827-28 (1988) (Participants vested property interest is not limited to their pension benefits, but extends to the underlying assets of their public pension system), Valdes v. Cory, 139 Cal.App.3d 773, 788-89, 189 Cal. Rptr. 212, 224 (1983)(diverting the use of trust fund assets to pay for financial obligations of the state to the retirement system is no different than the state removing money from the public employee trust fund to balance the budget and is unconstitutional), Weaver v. Evans, 80 Wash.2d 461, 495 P.2d 639 (1972), Dombrowski v. City of Philadelphia, 431 Pa. 199, 245 A.2d 238 (1968). Prior to the present case, Wisconsin was among the states holding that the property interests held by Participants in a public pension system are not limited to benefit commitments, but

extends to the underlying assets and earnings of the system. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 556-57, 559-65, 544 N.W.2d 888, 891-894(1996), State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 10, 106 N.W.2d 301, 305 (1960).

There are also states that have held that participants' property interests and contract rights in their pension system are limited to satisfaction of their benefit commitments. The Illinois Supreme Court reached a different result than New York when construing a provision in the Illinois Constitution very similar to that contained in the New York Constitution. McNamee v. Illinois, 173 Ill.2d 433, 672 N.E.2d 1159 (1996). In McNamee, the legislature amended the state pension code so as to lower unfunded liability amounts due from public employers, and provide the state with more favorable financing terms. Plaintiffs filed a complaint contending that this amendment reduced the security of the fund, and thereby violated art. XIII, § 5 of the Illinois Constitution which provides that "[m]embership in any pension or retirement system of the State ... shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." *Id.* at 436, 1161. The Illinois Supreme Court rejected plaintiffs' claims, and concluded that the Illinois constitution "creates an enforceable contractual relationship that protects only the right to receive benefits," and provides no protection of the method of funding or the underlying assets except to the extent benefits are impaired "by placing a fund on the verge of default or imminent bankruptcy." *Id.* at 446, 1166. Similar holdings have been reached by the Supreme Courts of Michigan and Kansas in Kosa v. Treasurer v. State of Michigan, 78 Mich. App. 316, 292 N.W.2d 452, 460 (1980), Jones v. Board of Trustees Retirement System, 910 S.W.2d 710 (1995).

An aging population cannot have financial security without clarity and protection of its pension property rights. Long term interests in pensions earned by decades of public service should not be subject to short term expediency given legitimacy by judicial tampering with established property interests.

II. THE WISCONSIN SUPREME COURT DECISION IS ERRONEOUS.

The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation.." Phillips v. Washington Legal Foundation et al., 524 U.S. 156, 163-64 (1998). The Takings Clause *protects* private property; it does not create it. *Id.* at 164. Thus, in identifying a property interest so protected, this Court looks to "existing rules or understandings that stem from an independent source such as state law." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

Even though fundamental principles of state property law may define property rights, the Takings Clause nevertheless limits a state's authority to take property without just compensation by redefining preexisting property rights. Thus, "a State, by *ipse dixit,* may not transform private property *into* public property without compensation," Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164(1980), nor can it "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." Phillips v. Washington Legal Foundation et al., 524 U.S. 156, 167 (1998). While recognizing that its previously enunciated principles concerning the property rights of Participants as "sound", the *Wisconsin Supreme Court disavows long recognized property* interests by claiming a need to ". . . restate [these principles] in a contemporary context, attempting to articulate a more complete statement of the property interest and rights enjoyed by participants." App. 51.

The Court did not explicitly overrule or reverse its prior holdings; it simply accorded them lip service or disregarded them altogether and declared, contrary to well established jurisprudence on the subject, that the property interest held by WRS Participants is limited to their benefit commitments. The Court then held that since no actual impairment to benefit commitments could be demonstrated by Participants, that no property had been taken. App. 75.

In disavowing the long recognized property rights of WRS Participants in the underlying assets and earnings of the WRS., the Wisconsin Supreme Court also violated this Court's long established takings jurisprudence. Phillips v. Washington Legal Foundation et al., 524 U.S. 156, 167 (1998), *See, also,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

The Wisconsin Court also ignored the principle that while the legislature may prescribe procedures to be observed in the taking of private property for public use, any such procedure which results in the taking of private property without the payment of just compensation violates the due process clause. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 236-37 (1897).

A. WRS PARTICIPANTS HAVE A VESTED AND CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE ASSETS AND EARNINGS CONTAINED IN THE PUBLIC EMPLOYE TRUST FUND.

WRS Participants have a vested property interest in all the assets and earnings of the WRS in addition to their benefit commitments. This has long been recognized under Wisconsin law. Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 18, 19, 558 N.W.2d 83, 90 (1997), Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 556-65, 544 N.W.2d 888, 891-894 (1996), App. 159. State Teachers' Retirement Board v. Giessel, 12 Wis. 2d 5, 106 N.W.2d 301, 304, 305 (1960) (Giessel).

In Giessel, a unanimous Wisconsin Supreme Court invalidated legislation directing that $18,737 of the cost of a government study on retirement systems be paid for with assets of the Wisconsin Retirement Fund (the WRS predecessor). Defendant argued that the participants do not have a vested right in the assets of the fund until such time as those assets are credited to an individual participants' account. The Court rejected Defendant's position and held that participants have a vested interest in the proper use of all the assets and earnings of

their pension system. *Id.* at 11, 305. This principle has been expressly extended to the earnings on assets contained in the WRS. Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 19, 558 N.W.2d 83, 91 (1997).

The Wisconsin Supreme Court has stated as follows:

> Any pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible.
>
> ***
>
> The Association argues that the transfer of funds prescribed by § 978.12(5)(c)5 will not affect the benefits paid to any retiree or member of the County Plan. The Association contends that, since the contributions to be transferred make up less than one-third of one percent of the County Plan's net assets, the transfer will not diminish or "take" the benefits of County Plan employees and retirees.
>
> We disagree. Governmental takings do not become exempt from due process requirements simply because they may be actuarially insignificant. Wisconsin Stat. § 978.12(5)(c)5 orders Milwaukee County to transfer funds from the County Plan to the State Plan. This transfer takes funds directly out of the County Plan trust fund. The gravity of a property deprivation is irrelevant to the question of whether such rights are violated without due process. Goss v. Lopez, 419 U.S. 565, 576, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975).
>
> ***
>
> While the specific transfer of trust funds pursuant to Wis.Stat. § 978.12(5)(c)5 may not

> immediately threaten the benefits of vested County Plan beneficiaries, the precedent set by such a transfer certainly could. ...
>
> In the present case, the legislature could have easily provided service credits to its new employees under the State Plan, and funded the resulting larger retirement pensions with state money. Instead, the legislature chose to give the service credits, but to pay for the larger pensions by transferring money out of the County Plan. This it cannot do. In the present case, **the state cannot simply "reach" into the County Plan to pay for obligations it has incurred**. Vested County Plan beneficiaries have protectable property interests in the integrity and security of their retirement fund. Because Wis.Stat. § 978.12(5)(c) deprives the beneficiaries of this protectable interest, the statute takes property without due process of law.

Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 556-57, 559-65, 544 N.W.2d 888, 891-894(1996) (emphasis added).

The monies in the Trust Fund have been irrevocably placed in trust for the benefit of WRS Participants and annuitants, and the State cannot direct the use of such money for non-Trust purposes. App. 142, Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 18, 558 N.W.2d 83, 90 (1997). The State has not retained any right to alter the terms of the Trust. *Id.* at 19, 23, 91, 93. In the absence of specific provisions reserving for Participating Employers rights and/or beneficial interests in assets and earnings of the Trust Fund, no such rights or beneficial interests exist, and none can be imposed by the legislature. *See e.g.* Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 558 N.W.2d 83 (1997) 76 Am. Jur. 2d, Trusts § 322 (2000)(Trusts are to be administered in accordance with the terms of the trust, and neither a court, nor a beneficiary, nor the legislature has the authority to modify or abrogate the terms of

a trust), George G. Bogert & George T. Bogert, The Law of Trusts & Trustees § 42, at 431-33 (2d ed. 2000) (The settlor has no further interest in anything conveyed to the trust except to the extent of expressly reserved rights).

The Wisconsin Supreme Court has held that Legislative intervention into the Trust Fund that is not authorized by Chapter 40 Wis. Stats. is only constitutional in limited circumstances "when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." To be constitutional, legislative intervention must be "necessary to protect actuarial soundness." Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996).

The Court adopted the stipulation of the parties that the Trust Fund is not financially troubled, and the provisions of Act 11 herein were not needed to protect the actuarial soundness of the Trust Fund. App. 121, 135. The Court then turned the existing standard on its head, and gave the legislature license to do as it pleases so long as actuarial soundness is not transgressed. This effectively establishes a means test for a taking: If the trust fund remains "actuarially sound" the taking passes constitutional muster. The court refused to honor its basic precedent that the assets of the trust belong to the beneficiaries of the trust. A bull market does not change that.

B. THE CHALLENGED LEGISLATION TAKES THE PROPERTY OF WRS PARTICIPANTS WITHOUT JUST COMPENSATION AND DUE PROCESS OF LAW.

Common sense and candid legal analysis yields no doubt that the challenged provisions of Act 11 "takes" $200 million of the earnings on Participants' WRS assets and uses such earnings to pay financial obligations of public employers who have no property right or beneficial interest in the assets and earnings of the WRS.

The Act 11 "credit" is unprecedented and without such credit provisions, trust assets would not be applied toward

participating employers' required payments. Instead, the $200 million would be part of the total balance of the employer reserve and would be used to purchase annuities for WRS Participants upon retirement. App. 123.

The credit account provisions result in a very significant and immediate reduction in employer contribution rates and a corresponding $200 million reduction in Trust Fund assets. The Wisconsin Department of Employee Trust Funds made preliminary calculations of the effect that the $200 million credit will have on each category of participating employer, and a chart reflecting those effects is contained in the stipulation of facts and included in the Appendix at 274.

As reflected in the stipulated chart, using the credit account to pay the State employers' obligations for unfunded liability will result in State employers being relieved from such unfunded liability payments for an average of 22.1 months. This represents an aggregate savings to State employers of approximately 56.3 million dollars -- an amount which State employers would otherwise have an absolute obligation to pay into the WRS over the next 22.1 months. County employers enjoy respite from their unfunded liability payments for a period of 22.8 months, and result in an aggregate savings to such employers of $24.7 million, and School Districts are relieved of unfunded liability payments for an average of 19.6 months, for a total savings to such employers of $84 Million.

Clearly, the $200 million employer credit account provides a benefit solely to participating employers. On average, each participating employer's share of relief from the $200 million credit account pays the required payments for between 19.6 and 58.2 months. App. 274.

There is no legitimate trust purpose being served by the employer credit account. The assets of the Trust Fund may only be used to fulfill benefit commitments to WRS Participants, as set forth in Chapter 40, and "shall not be used for any other purpose." App. 102, 142. "Contributions placed in the [employer] accumulation reserve are [to be] applied solely to the payment of fixed monthly annuities [to Participants upon

their retirement]..." Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 556, 544 N.W.2d 888, 890 (1996). The provisions of Chapter 40 governing the payment of unfunded liability provide (1) that employer payments for unfunded liability are to be amortized over 40 years; (2) that an employer's payments for unfunded liability must be made until paid in full; and (3) that employers may pay contributions for unfunded liability in advance. App. 114-15, 157-58. Nowhere does Chapter 40 authorize the use of assets of the Trust Fund to pay or defer employer required contributions for unfunded liabilities or current service contributions.

C. THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION AND DUE PROCESS OF LAW IS NOT LEGITIMIZED BY THE USE OF AN INDIRECT OFFSET.

The Wisconsin Supreme Court's decision herein gives lip services to the property rights of WRS Participants, but concludes that the property of WRS Participants was not taken because the employer credit account does not physically remove any assets from the WRS. The analysis of the Wisconsin Supreme Court places form over substance and cannot withstand scrutiny.

The Court, in its decision herein, states as follows:

> **Once contributions enter the employer reserve, they no longer belong to employers and may not be reclaimed by employers.** They are assigned to participants. **Non-annuitant participants have the right to block improper diversions from the employer reserve** and to protect the integrity and security of the employer reserve so that benefit commitments will be fulfilled.

App. 79 (emphasis added).

Thus, it is clear that the legislature cannot lawfully direct that $200 million of the assets contained in the Employer Reserve be returned to participating employers for any purpose because neither the State nor the participating employers have or retain any property interest in the assets contained in the Employer Reserve. The Wisconsin Supreme Court held that this proscription was avoided in the present case because the legislature did not physically remove the funds and return them to participating employers, but rather, directed that such funds be used to pay financial obligations of participating employers. App. 79. It is respectfully submitted that the constitutional protection afforded by the takings clause cannot be so easily circumvented.

While the fungibility of money makes it possible to manipulate the WRS in a manner that causes those other than Participants and annuitants to receive the benefit of assets in the Trust Fund without physically removing such assets from the WRS, that does not make such schemes legitimate. Courts have long recognized that there is no distinction between directly removing money from a fund, and using the indirect method of setoff to achieve the same result.

For example, Raskin v. Moran, 684 F.2d 472 (7th Cir.1982) involved a constitutional challenge to a Wisconsin statute which reduced the salary of certain reserve judges by the amount of federal social security benefits they received. Under § 203(f)(3) of the Social Security Act, these judges were entitled to social security benefits without a reduction based on earned income. The Seventh Circuit held there was a constitutional impairment based on the supremacy clause, holding as follows:

> Although not directly preventing or impeding plaintiffs' receipt of social security benefits, Wisconsin effectively deprives the recipient of those federal benefits by reducing plaintiffs' salaries in an amount precisely equal to the federal benefits. Indeed, we would put form over substance if we held that only direct efforts to reduce, divert or eliminate social security benefits were in conflict with section 203(f)(d)....

Id. at 477-78 (footnotes omitted).

In a later Wisconsin state case involving the use of a setoff to reduce public pension benefits, the Supreme Court of Wisconsin reached a similar result. State ex rel. Canon v. Moran, 111 Wis. 2d 544, 331 N.W.2d 369 (1983) ("Canon"). In Canon, certain circuit court judges brought an action challenging the constitutionality of a statute which operated to reduce their state salaries by the amount of county pension benefits they were receiving by virtue of their prior judicial service when employed by the county. The Plaintiffs argued that the offset impaired their contract rights under the county pension system because it violated the statutory prohibition against reducing their pension benefits, and thereby deprived them of property without due process of law. The defendants argued that since the legislation at issue "did not reduce or eliminate the Plaintiffs' pension benefits, the obligations of [their pension contract] were not impaired." *Id.* at 555, 375. The Wisconsin Supreme Court rejected the Defendants arguments, and stated as follows:

> The defendants argue, and the court of appeals held, that since Chapter 38 did not reduce or eliminate the plaintiffs' pension benefits, the obligations of their MCERS contracts were not impaired. We disagree. The distinction drawn by the defendants and the court of appeals between a deprivation of pension benefits and a reduction in salary by the same amount is illusory.

Id.; See, also, Valdes v. Cory, 139 Cal.App.3d at pp. 773, 788-89 (Ct.App. 1983):

> Had the Legislature actually appropriated any of the PERS [Public Employees' Retirement System] trust funds for purposes unrelated to the benefit of PERS members, e.g., to balance the state budget and avoid a year-end deficit, we would have no difficulty concluding that such legislative action modified vested rights of PERS members. When instead the Legislature directs that funds held in trust for the exclusive benefit

> of the members and beneficiaries of PERS be used to satisfy the state's contractual obligations to make monthly contributions to the retirement fund so that monies regularly appropriated for that purpose can irretrievably be redirected to balance the state budget, the effect is precisely the same, i.e., vested rights of PERS members are impaired.".

The reasoning of the above cited cases is applicable to the present case. There is no substantive difference between giving participating employers a $200 million dollar credit on their obligations to the Trust Fund, and transferring $200 million out of the Trust Fund into the pockets of participating employers.

D. THE HOLDING OF THE WISCONSIN SUPREME COURT VIOLATES WELL SETTLED TRUST PRINCIPLES

Section 40.01(2), Stats. provides as follows:

> The **public employe trust fund** is a **public trust** and shall be managed, administered, invested, and otherwise dealt with **solely for the purpose of ensuring the fulfillment** at the lowest possible cost **of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose**.

App. 142 (emphasis added).

Rights to trust property are determined by the trust instrument, which in the present case, consists of the provisions of Chapter 40 of the Wisconsin Statutes. App. 142. The settlor of a trust has no further interest in anything conveyed to the trust except to the extent of expressly reserved rights. George G. Bogert & George T. Bogert, The Law of Trusts & Trustees § 42, at 431-33 (2d ed. 2000). If nothing has been reserved, the settlor has no right to remove assets from the trust, and has no right to use trust assets. *Id.* Chapter 40 does not grant or preserve any property rights in favor of participating employers – such assets must remain in the trust and be used solely to

fulfill benefit commitments to Participants. App. 102, 142.

The Wisconsin Supreme Court conspicuously skirts the fundamental issue in this case. To whom do the assets in the WRS belong? The Court clearly states that participating employers have no property interest in the assets of the WRS, and that such assets are "assigned to participants." App. 79. Then the court states that participants' property interest is limited to their benefit commitments. The Wisconsin Supreme Court apparently thinks that nobody has a property interest in the funds contained in the WRS until they are need to pay an active annuity. In the interim these funds appear to be up for Legislative grabs. Legislators who lack vision, or concern beyond the next election, should not be given license to raid public pension systems in order to defer difficult short term decisions in exchange for long term public difficulties or long cherished constitutionally protected values.

E. ACT 11 IMPAIRS THE CONTRACT RIGHTS OF WRS PARTICIPANTS.

The United States Constitution prohibits the passage of laws which impair the obligations of contract. U.S. Const. Art. I, § 10. The contracts clause limits the power of a state to modify its own contracts with other parties. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). The most basic purposes of the Contracts Clause, as well as the notions of fundamental fairness that transcend the clause itself, point to these simple principles: the state must keep its promises, and it may depart therefrom only for a significant and legitimate public purpose. *Id.* at 26. Such a public purpose must amount to something more than providing states with budgetary relief. *Id.* ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

The vested contract right of WRS Participants is established by Section 40.19(1), Stats., which expressly provides that "rights exercised and benefits accrued to an employee under this chapter [40] for service rendered are **due**

as a contractual right and may not be abrogated by any subsequent legislative act." App. 159 (emphasis added). Section 40.19(1) gives Participants vested contractual and property rights in the WRS. Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 18-20, 558 N.W.2d 83, 91 (1997).

Act 11 impairs the contract rights of WRS Participants in three respects. First, it forgives $200 Million of the unfunded liability debt owed to the WRS by Participating Employers without removing the underlying obligation of the WRS to pay benefits to Participants for the period of time prior to their participation in the WRS. Chapter 40 does not permit the forgiveness of participating employers' debt for unfunded liabilities, and to do so, violates the WRS contract. App. 157-158, 235-47. The impairment is substantial because it results in Participants being deprived of $200 Million in assets in which they have a vested property interest, results in the WRS paying for benefits for which it did not receive the promised contributions, and opens the door to future legislative grabs that undermine the security of the WRS.

Furthermore, there is no legitimate public purpose being served by Act 11 – other than the Court's brazen statement declaring the purpose of the credit account as being "to provide 1,200 government employers (and taxpayers who support them) respite from employer required contributions." App. 75.

Second, Act 11 abrogates the provisions of Chapter 40 which provides that the assets of the WRS are held in Trust for the exclusive purpose of satisfying benefit commitments to WRS Participants. By directing that the assets of the system be utilized for purposes of paying a debt owed by participating employers, Act 11 violates the WRS contract.

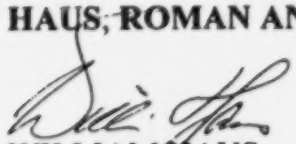
Third, Act 11 violates that portion of the WRS contract which requires that the fund shall be maintained as a qualified plan for federal income tax purposes, and prohibits administration of the plan in a manner that will violate the qualification rules of the Internal Revenue Code. App. 143. Under the IRS rules for qualified plans, it must be impossible

"for any part of the corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of [participating] employees or their beneficiaries." 26 USCA 401(a), Treas. Reg. 1.401-2(a)(2)-(3), App. 162, 163. Act 11 clearly violates this proscription by diverting and using assets of the Trust Fund for the purpose of paying employer required contributions -- a purpose that is not for the benefit of participating employees or their beneficiaries. It is difficult to imagine how taxpayers get "respite from employer required contributions" without violating the qualification rules of the Internal Revenue Code.

For all the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

HAUS, ROMAN AND BANKS, LLP



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(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

STATE ENGINEERING ASSOCIATION, *et al.*

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*

Respondents.

Petition for Writ of Certiorari to the Supreme Court for the State of Wisconsin

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF WISCONSIN.

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC., John Charewicz, David Mahoney, Susan Armagost, Steven Urso and State Engineering Association, by its President, Thomas H. Miller, David Buschkopf, Ross Johnson, Melvin Sensenbrenner, Bernard Kranz and Thomas H. Miller,

Petitioners,

v.

George LIGHTBOURN, Secretary of the Wisconsin Department of Administration, Jack C. Voight, Wisconsin State Treasurer, Wisconsin Education Association Council, by its President Terry Craney and its Vice-President, Stan Johnson, and Donald Krahn, Margaret Guertler, Gerald Martin and Phyllis Pope,

Respondents.

No. 99-3297-OA.
Argued Oct. 4, 2000.Decided June 12, 2001.

Professional police association, engineering association, and associations' members brought declaratory judgment action challenging constitutionality of act making numerous changes in the Wisconsin retirement system (WRS). After acceptance of original jurisdiction, the Supreme Court, David T. Prosser, J., held that: (1) act received requisite three-fourths vote of entire elected membership of legislature; (2) section of act directing a $4 billion distribution from transaction amortization account (TAA) did not result in an unconstitutional taking or impairment of contract; (3) section directing that $200 million of the estimated $1.236 billion sent to employer reserve be used as employer contribution credits against unfunded liability did not result in an unconstitutional taking or impairment of

contract; (4) act did not violate fundamental principles of chapter on public employee trust fund or any right preserved by statute; (5) section amending statutory assumed rate did not usurp authority of Employee Trust Funds (ETF) Board; and (6) section raising the 65% benefit cap by five percent for all employees except protective occupation employees did not violate equal protection.

Rights declared and relief denied.

William A. Bablitch, J., concurred in part and dissented in part and filed opinion.

Shirley S. Abrahamson, Chief Justice, dissented and filed opinion in which Ann Walsh Bradley, J., joined.

(1983)). This court usually follows these steps in evaluating such claims.

For the petitioners, Wisconsin Professional Police Association, Inc., John Charewicz, David Mahoney, Susan Armagost and Steven Urso, there were briefs by Lester A. Pines, Carol Grob, Linda Harfst and Cullen, Weston, Pines & Bach, Madison, and oral argument by Lester A. Pines.

For the petitioners, State Engineering Association, Thomas H. Miller, David Buschkopf, Ross Johnson, Melvin Sensenbrenner, and Bernard Kranz, there were briefs by Michael E. Banks and Haus, Resnick and Roman, LLP, Madison, and oral argument by William Haus.

For the respondents, George Lightbourn, Secretary of the Wisconsin Department of Administration, and Jack C. Voight, Wisconsin State Treasurer, there was a brief by Ann Ustad Smith and Michael Best & Friedrich, LLP, Madison, and oral argument by Ann Ustad Smith.

For the respondents, Wisconsin Education Association Council, Terry Craney, Stan Johnson, Donald Krahn, Margaret Guertler, Gerald Martin and Phyllis Pope, there was a brief by Lucy T. Brown, Anthony L. Sheehan, Michael J. Van Sistine and Wisconsin Education Association Council, Madison, and oral argument by Anthony L. Sheehan.

An amicus curiae brief was filed by Timothy E. Hawks and Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Milwaukee, on behalf of the Wisconsin Federation of Teachers, WFT, AFT, AFL-CIO.

An amicus curiae brief was filed by Bruce F. Ehlke and Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Milwaukee, on behalf of the AFSCME District Council 40.

¶1 DAVID T. PROSSER, J.

This is an original action under Article VII, Section 3(2) of the Wisconsin Constitution. [FN1]

> FN1. "The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction." Wis. Const. art. VII, § 3(2).

¶2 The petitioners consist of two groups: (1) the Wisconsin Professional Police Association, Inc. (WPPA) and several of its individual members, and (2) the State Engineering Association (SEA), by its president, Thomas H. Miller, and several of SEA's individual members. The interests and claims of these petitioners are not identical, but all petitioners challenge the constitutionality of portions of 1999 Wisconsin Act 11 (Act 11) as amended by 1999 Wisconsin Act 12. [FN2] Together, the two acts make numerous changes in the Wisconsin retirement system (WRS or the system).

> FN2. The subject of this litigation is 1999 Wisconsin Act 11. We note that 1999 Wisconsin Act 12 made minor corrections to 1999 Wisconsin Act 11. This opinion uses the terms "Act 11" or "the Act" to refer to the combination of 1999 Wisconsin Acts 11 and 12, unless noted otherwise. The changes found in Act 12 do not materially affect the issues in this case.

¶3 The respondents are George Lightbourn, Secretary of the Wisconsin Department of Administration, and Jack C. Voight, Wisconsin State Treasurer, as well as the Wisconsin Education Association Council (WEAC) by its president, Terry Craney, and its vice-president, Stan Johnson, and four other individuals who are now or have been affiliated with WEAC. WEAC is the largest organization in Wisconsin representing teachers. Many of WEAC's members are participants in the WRS.

¶4 The supreme court limits its exercise of original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large. We accepted

original jurisdiction in this case because it meets that test. The challenges to Act 11 impact the pension interests of more than 460,000 "participants" [FN3] in the system, as well as the fiscal responsibilities of the State of Wisconsin and all government employers [FN4] within this state whose past or present employees are participants in the system. Historically, several of the major cases examining public employee pension issues have begun as original actions. *See* State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 193 N.W. 499 (1923); State ex rel. Thomson v. Giessel, 262 Wis. 51, 53 N.W.2d 726 (1952) (Giessel I); State ex rel. Thomson v. Giessel, 265 Wis. 558, 61 N.W.2d 903 (1953) (Giessel II); Columbia County v. Bd. Of Trustees of Wis. Ret. Fund, 17 Wis.2d 310, 116 N.W.2d 142 (1962). Moreover, Act 11 includes a nonstatutory provision requesting this court to "take jurisdiction of any original action relating to the implementation of this act." 1999 Wis. Act 11, § 27(4t).

FN3. Wisconsin Stat. § 40.02(45) (1997-98) defines "participant" as "any person included within the provisions of the Wisconsin retirement system by virtue of being or having been a participating employee whose account has not been closed under s. 40.25(1) or (2)."

All statutory references are to the 1997-98 volumes of the Wisconsin Statutes unless noted otherwise. In discussing the changes made to Chapter 40 of the statutes by 1999 Wis. Act 11, we cite the 1997-98 volumes in order to accurately describe these changes. The 1999-2000 volumes of the statutes contain Chapter 40 as modified by Act 11.

Notwithstanding our use of the 1997-98 volumes of the statutes, we use the word "employee," as opposed to "employe," whenever we quote the statutes and in all other discussion throughout this opinion. 1999 Wis. Act 185, § 193 changed the spelling of the word

"employe" to "employee" in the statutes and this change is reflected in the 1999 2000 volumes. Because the legislature has decided to use the "ee" spelling in the statutes, we have used the same spelling, even in the statutory quotations from the 1997-98 volumes and the quotations from Act 11. We have not, however, changed the spelling of "employe" in any quotations from cases.

FN4. Wisconsin Stat. § 40.02(28) provides:

"Employer" means the state, including each state agency, any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state and any federated public library system established under s. 43.19 whose territory lies within a single county with a population of 500,000 or more, except as provided under ss. 40.51(7) and 40.61(3), or a local exposition district created under subch. II of ch. 229. Each employer shall be a separate legal jurisdiction for OASDHI purposes.

¶5 Petitioners present multiple challenges to components of Act 11. SEA also challenges the legality of the entire Act on procedural grounds. We have carefully examined each claim presented and conclude that none of the challenged portions of Act 11 is unconstitutional beyond a reasonable doubt. We also conclude that the Act was not approved in violation of Article IV, Section 26 of the Wisconsin Constitution. Consequently, the injunction issued by this court on December 29, 1999, is lifted so that Act 11 may be enforced.

I. FACTUAL BACKGROUND

¶6 This case requires a thorough grasp of the Wisconsin retirement system. For its facts, the court relies on the lengthy Stipulation of Facts agreed to by the parties, under the

supervision of Reserve Circuit Judge Michael J. Barron, and an invaluable 75-page analysis of the system by Tony Mason of the Legislative Fiscal Bureau. *See* Tony Mason, Wisconsin Legislative Fiscal Bureau, *Informational Paper No. 73, Wisconsin Retirement System* (1999) [hereinafter *Wisconsin Retirement System].* Mason's analysis is listed as a stipulated exhibit by the parties. The court draws heavily upon these two documents, as well as Chapter 40 of the Wisconsin Statutes, for its discussion in this section.

¶7 The Wisconsin retirement system is the product of many years of legislative action on public employee retirement in Wisconsin. This state's first retirement plan for public employees was created for Milwaukee protective service employees (police and fire) in 1891. [FN5] Many additional retirement plans followed, including a pension plan for Milwaukee teachers in 1909, and a statewide plan for teachers in 1911. [FN6] As a general rule, these early plans operated independent of each other, either as county or municipal retirement plans or as retirement plans covering certain types of employees, such as teachers and protective service employees. [FN7]

FN5. *See* § 1, ch. 287, Laws of 1891, *cited in* Tony Mason, Wisconsin Legislative Fiscal Bureau, *Informational Paper No. 73 Wisconsin Retirement System* 1 (1999) [hereinafter *Wisconsin Retirement System].*

FN6. *Wisconsin Retirement System, supra,* at 1 (citing ch. 510, Laws of 1909 and ch. 322, Laws of 1911).

FN7. *Wisconsin Retirement System, supra,* at 1-3.

¶8 In 1945, the legislature began studying the possibility of consolidating various public employee retirement plans; [FN8] and in 1947, it consolidated many of the plans into a state system known as the Wisconsin Retirement Fund. [FN9] The legislature also created a 10-member Joint Survey Committee on Retirement Systems to monitor public pension plans and proposed statutory changes to the state-operated plans. [FN10]

FN8. *Wisconsin Retirement System, supra,* at 2; Stipulation of Facts at § 6.

FN9. *Wisconsin Retirement System, supra,* at 2-3 (citing ch. 206, Laws of 1947, which consolidated various statewide pension plans).

FN10. *Wisconsin Retirement System, supra,* at 3 (citing ch. 376, Laws of 1947, which created the Joint Survey Committee on Retirement Systems).

¶9 Over the years, consolidation moved forward. In 1967, the legislature reorganized the executive branch of state government, and it created the Department of Employee Trust Funds (DETF) as well as a seven-member Employee Trust Funds Board ETF Board or Board) to direct and supervise the new department. [FN11] One result of this legislation was to bring all non-Milwaukee pension plans under the administration of DETF. [FN12]

FN11. *Wisconsin Retirement System, supra,* at 4 (describing ch. 75, Laws of 1967 as "another significant step towards retirement system consolidation").

FN12. *Wisconsin Retirement System, supra,* at 4 (explaining the result of ch. 75, Laws of 1967).

¶10 In 1975, efforts began to unite the Wisconsin Retirement Fund, the State Teachers Retirement System, and the Milwaukee Teachers Retirement Fund into a system to be known as the WRS. [FN13] By 1982, the legislature completed this merger and folded 90 percent of all public employees in Wisconsin into one pension system. [FN14] This legislation solidified the administration and management structure of the WRS under the ETF Board. [FN15]

FN13. *Wisconsin Retirement System, supra,* at 4 (arguing "the most significant advancement of the post-1948 pension fund merger philosophy was embodied in ch. 280, Laws of 1975").

FN14. *Wisconsin Retirement System, supra,* at 4 (citing ch. 96, Laws of 1981); Stipulation of Facts at ¶ 6.

FN15. *Wisconsin Retirement System, supra,* at 4 (describing effect of ch. 96, Laws of 1981).

¶11 For purposes of this litigation, the WRS consists of approximately 461,000 participants: roughly 255,000 active employees, 103,000 annuitants, and 103,000 "inactive participants" (former participating employees who have not yet become annuitants). [FN16]

FN16. Stipulation of Facts at ¶43. "An 'inactive participant' is a participant who is not an annuitant or a participating employee ." Stipulation of Facts at ¶ 41.

¶12 There are four categories of active participating employees. The vast majority (about 234,000) are classified as general employees. [FN17] The other three categories are (1) elected officials and executive employees; (2) protective service employees *not* subject to Titles II and XVIII of the federal Social Security Act; and (3) protective service employees subject to the federal Social Security Act.

FN17. Stipulation of Facts at ¶ 43.

¶13 At the end of 1998, the WRS was supported by nearly 1,200 different employers, including the agencies of the State of Wisconsin. [FN18] The WRS is funded by contributions from employers and employees, and the interest earned on these contributions. [FN19]

FN18. Stipulation of Facts at ¶ 36.

FN19. Wis. Stat. § 40.05; *Wisconsin Retirement System, supra,* at 22; Stipulation of Facts at § 15 (describing where the fixed retirement investment trust funding comes from).

A. Employee Contributions

¶14 Employee required contributions are determined on a statutorily-mandated percentage of an employee's income. [FN20] The four different categories of employees are required to contribute different percentages of their income to their retirement. [FN21] Employee required contributions range from 5 percent to 8 percent of employee income, depending upon an employee's statutory classification. [FN22] In recent years, the state and other public employers have "picked up" most employee required contributions as part of their overall compensation of employees. [FN23] This practice is permitted by Wis. Stat. § 40.05(1)(b). [FN24] State and local employers "pick up" about 99 percent of employee required contributions. [FN25] With certain limitations, employees may enhance their pensions by contributing more than the statutorily-required amount. [FN26] This supplementary payment is a voluntary contribution.

FN20. Wis. Stat. § 40.05(1); *Wisconsin Retirement System, supra,* at 34.

FN21. Wis. Stat. § 40.05(1); *Wisconsin Retirement System, supra,* at 34; Stipulation of Facts at ¶ 49.

FN22. Wis. Stat. § 40.05(1)(a); *Wisconsin Retirement System, supra,* at 35 (Table 22), 44 (Table 27).

FN23. Wis. Stat. § 40.05(1)(b); *Wisconsin Retirement System, supra,* at 37-38, 43 (Table 26).

FN24. *Wisconsin Retirement System, supra,* at 37.

FN25. *Wisconsin Retirement System, supra,* at 43 (Table 26). The participants in the WRS are all public employees. Some work for the State of Wisconsin (state) and others work for public employers such as counties, cities, towns, villages, school districts, and library districts. Wis. Stat. §§ 40.02(27) and 40.21. Throughout this opinion, we frequently refer to the state alone when we discuss employers. In so doing, we mean to include other public employers.

FN26. Wis. Stat. § 40.32.

¶15 A different kind of employee required contribution is known as a "benefit adjustment contribution." [FN27] The benefit adjustment contribution resulted from the increased retirement benefits approved by the legislature in 1983 Wis. Act 141. [FN28] Wisconsin Stat. § 40.05(2m) sets the benefit adjustment contribution at 1 percent of employee earnings. [FN29] Many employers have chosen to pick up this contribution for their employees; and for accounting purposes, the "benefit adjustment contribution" is treated as an employer contribution. [FN30] Wisconsin Stat. § 40.05(2n) permits the ETF Board to adjust annually the required benefit adjustment contribution rates, if so advised by the actuary. [FN31] For example, even though Wis. Stat. § 40.05(1)(a) sets employee contribution rates at a range of 5 to 8 percent, adjustments in the rates by the ETF Board meant that the rates ranged from 4.3 to 5.8 percent in 1999. [FN32]

FN27. Wis. Stat. § 40.05(2m); *Wisconsin Retirement System, supra,* at 36-37; Stipulation of Facts at ¶ 26.

FN28. *Wisconsin Retirement System, supra,* at 46 (citing 1983 Wis. Act 141).

FN29. Wis. Stat. § 40.05(2m); *Wisconsin Retirement System, supra,* at 36.

FN30. Wis. Stat. § 40.05(2m); *Wisconsin Retirement System, supra,* at 36.

FN31. Wis. Stat. § 40.05(2n); *Wisconsin Retirement System, supra,* at 36-37; Stipulation of Facts at ¶ 26.

FN32. Stipulation of Facts at ¶ 49.

B. Employer Contributions

¶16 Employer contributions are calculated in a different

manner from employee required contributions. Employer contribution rates, expressed as a percentage of payroll, are not set in the statutes but are determined annually as part of an actuarial evaluation of the WRS. [FN33] Each year the WRS consulting actuary evaluates the funding requirements for the system to meet the costs of estimated future retirement benefits, utilizing the actuarial assumptions determined in the consulting actuary's tri-annual review . [FN34] This valuation process is typically conducted during the late spring of each year. [FN35] The annual contribution rate developed for employers is the amount sufficient to fund these normal costs "net of all revenues received from the statutory employee-required contributions, the benefit adjustment contributions and those investment earnings credited as current income." [FN36] The employer contribution rates developed by the actuary are presented to the ETF Board for formal approval and become effective on the next January 1. [FN37]

FN33. Wis. Stat. § 40.05(2); *Wisconsin Retirement System, supra,* at 38; Stipulation of Facts at ¶ 28.

FN34. *Wisconsin Retirement System, supra,* at 38; Stipulation of Facts at ¶ 28.

FN35. *Wisconsin Retirement System, supra,* at 38; Stipulation of Facts at ¶ 28.

FN36. *Wisconsin Retirement System, supra,* at 38; Stipulation of Facts at ¶ 28.

FN37. *Wisconsin Retirement System, supra,* at 38; Stipulation of Facts at ¶ 28.

¶17 One of the actuarial assumptions used to determine employer contributions is the "assumed rate," defined in Wis. Stat. § 40.02(7) as "the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis." [FN38] In recent years, § 40.02(7) set the assumed rate at 7.5 percent (subject to modification by the ETF Board as provided in that statute). [FN39] However, in 1992, the ETF Board, upon recommendation of the actuary, changed the

assumed rate to 8 percent, and it used that assumed rate for purposes of determining contribution rates for calendar years 1993 through 2000. [FN40]

FN38. Stipulation of Facts at ¶ 29.

FN39. Stipulation of Facts at ¶ 29.

FN40. Stipulation of Facts at ¶ 29.

18 Another of the actuarial assumptions used to value the employer contributions is an assumption for across-the-board salary increases. [FN41] For years § 40.02(7) set the actuarial assumption for across- the-board salary increases at 1.9 percent *less* than the assumed rate (subject to modification by the ETF Board as provided in that statute). [FN42] However, the assumption for across-the-board salary increases was changed by the ETF Board, upon the recommendation of the actuary, several times. [FN43] The actuary's three-year investigation dated 1988, recommended (and the Board approved) changing the salary increase assumption from 6.0 percent to 5.6 percent. [FN44] The actuary's three-year investigation dated 1994 recommended (and the Board approved) changing the salary increase assumption from 5.6 percent to 5.3 percent. The actuary's three-year investigation dated 1997 recommended (and the Board approved) changing the salary increase assumption from 5.3 percent to 4.8 percent. [FN45]

FN41. Stipulation of Facts at ¶ 30.

FN42. Stipulation of Facts at ¶ 30.

FN43. Stipulation of Facts at ¶ 30.

FN44. Stipulation of Facts at ¶ 30.

FN45. Stipulation of Facts at ¶ 30.

¶19 In addition to the employer required contributions for current service, employers are required to pay contributions for

any unfunded prior service liability (unfunded liability) that is owed to the WRS. [FN46] An employer's unfunded liability is the result of two factors: (1) a grant of credit under the WRS for services rendered by an employee before the employer joined the WRS; and (2) an increase in benefits for an employee's prior service that is not wholly funded by money already in hand. [FN47] The second situation is now more common. When the legislature authorizes increased benefits for WRS participants and retroactively applies the benefit increase to prior service, it may force employers to make unexpected additional contributions to the employer reserve to fund the retroactive benefit increase. [FN48] Once a retroactive benefit increase is approved by the legislature, employers usually have to "make up" for not having made contributions in the past to fund that benefit increase.

FN46. Wis. Stat. § 40.05(2)(b); Stipulation of Facts at ¶ 31 (citing Wis. Stat. § 40.05(2)(b)); *Wisconsin Retirement System, supra,* at 39.

FN47. Stipulation of Facts at ¶ 31; *Wisconsin Retirement System, supra,* at 39.

FN48. *Wisconsin Retirement System, supra,* at 39.

¶20 Employer contribution rates for the payment of unfunded liability are currently amortized over 40 years. [FN49] Permitting employers to spread contributions for unfunded liability over many years has enabled employers to finance retroactive benefits and service credit. "For most WRS employers, [payments began in 1986 and] payments to retire the unfunded accrued liabilities arising from previous benefit improvements will continue until 2026." [FN50]

FN49. Wis. Stat. § 40.05(2)(b); Stipulation of Facts at ¶ 32 (citing Wis. Stat. § 40.05(2)(b)); *Wisconsin Retirement System, supra,* at 39.

FN50. *Wisconsin Retirement System, supra,* at 39.

C. WRS Trusts

¶21 The WRS includes two distinct trusts: a variable retirement investment trust (variable trust) and a fixed retirement investment trust (fixed trust or FRIT). [FN51] For purposes of this litigation, the variable trust contains approximately $7 billion [FN52] and the fixed trust contains about $48.7 billion. [FN53] The variable trust, which is not directly at issue in this case, is invested almost exclusively in common and preferred stock. [FN54] By contrast, the fixed trust contains a more diversified portfolio of investments than the variable trust. [FN55] The diversification of the fixed trust decreases a participant's potential to earn a large investment profit, but also decreases a participant's potential investment loss. [FN56]

FN51. Wis. Stat. § 40.04(3); *Wisconsin Retirement System, supra,* at 24-26; Stipulation of Facts at ¶ 12.

FN52. *Wisconsin Retirement System, supra,* at 26.

FN53. Stipulation of Facts at ¶15. The $48.7 billion figure does not necessarily reflect actual cash holdings of the fixed trust. Stipulation of Facts at ¶12 n. 2. Rather, accounting measures factor into the balance of the trust. Stipulation of Facts at ¶12 n. 2. In addition, the manner in which certain types of investment holdings of the fixed trust are valued, such as real estate, affect the balance of the trust. *Wisconsin Retirement System, supra,* at 28-29.
Further, the fixed trust does not necessarily hold $48.7 billion now. However, for purposes of this litigation, the parties have agreed that the fixed trust contained that amount at the end of 1998 and we will use end- of-1998 figures throughout this opinion unless otherwise explicitly stated. Stipulation of Facts at ¶15 (indicating total balance as of the last day of 1998). The 1998 figures were the most comprehensive available when the parties submitted briefs in this case. The precise account balances are not necessary to decide the constitutionality of Act 11.

FN54. *Wisconsin Retirement System, supra,* at 26. The variable trust permits participation only for employees who elected to participate in the variable trust prior to April 30, 1980. Wis. Stat. § 40.04(7)(a). Section 319g, ch. 221, Laws of 1979 precluded any additional elections to participate in the variable trust after April 30, 1980. Thus, the number of employees participating in the variable trust is limited and is dwindling as employees leave public employment.

An employee who elected to participate in the variable trust before April 30, 1980, currently can place up to 50 percent of the employee and employer contributions in the variable trust. Wis. Stat. § 40.04(7)(a). Any employee contributions not made to the variable trust are credited to the employee's account in the fixed trust. Wis. Stat. § 40.04(7). Employees also have the right to terminate their participation in the variable trust. Wis. Stat. § 40.04(7)(a).
Act 11 will once again allow employees to elect to participate in the variable trust. 1999 Wis. Act 11, § 14. The petitioners have not challenged this portion of Act 11.

FN55. *Wisconsin Retirement System, supra,* at 25 (Table 14). The fixed trust funds include investments in common and preferred stocks, public bonds, private placement securities, short-term cash holdings, and real estate. *Id.*

FN56. *Wisconsin Retirement System, supra,* at 25-26.

¶22 There are 12 different accounts and reserves within the fixed retirement investment trust. [FN57] The 12 accounts are as follows: (1) Wis. Stat. § 40.65 duty disability reserve, (2) income continuation insurance reserve, (3) long term disability insurance reserve, (4) accumulated sick leave conversion credits, (5) Milwaukee death benefit account, (6) Milwaukee retirement systems account, (7) Wis. Stat. § 62.13 police and

fire account, (8) WRS employer accumulation reserve, (9) WRS employee accumulation reserve, (10) WRS annuity reserve, (11) WRS undistributed earnings account, and (12) transaction amortization account. [FN58] Only two of the accounts, the Milwaukee retirement systems account and the WRS undistributed earnings account, are not affected by Act 11. [FN59]

FN57. Stipulation of Facts at ¶12; *Wisconsin Retirement System, supra,* at 25.

FN58. Wis. Stat. § 40.04(5); Stipulation of Facts at ¶12.

FN59. Stipulation of Facts at ¶13.

¶23 The four accounts or reserves most pertinent to this case are the WRS employer accumulation reserve, the WRS employee accumulation reserve, the WRS annuity reserve, and the transaction amortization account (TAA). [FN60]

FN60. Stipulation of Facts at ¶14; Wis. Stat. § 40.04(3) (outlining statutory structure for accounts and reserves of the public employee trust fund).

D. Employer Accumulation Reserve

¶24 The employer accumulation reserve holds employer required contributions plus benefit adjustment contributions, whether paid by employees or employers, and such other amounts as provided in Wis. Stat. § 40.04(5). [FN61] For purposes of this litigation, this account holds about $11.5 billion. [FN62] The funds in the employer reserve are held in one merged account. [FN63] In effect, the funds are pooled. [FN64] At the same time, the funds in this account are invested in both the fixed and variable trusts, depending upon the extent of employee choices to invest employer contributions in each trust respectively. [FN65]

FN61. Stipulation of Facts at ¶14; Wis. Stat. § 40.04(5).

FN62. Stipulation of Facts at ¶12.

FN63. Wis. Stat. § 40.04(5); *Wisconsin Retirement System, supra,* at 23; Stipulation of Facts at ¶17.

FN64. Wis. Stat. § 40.04(5); *Wisconsin Retirement System, supra,* at 23; Stipulation of Facts at ¶17.

FN65. *Wisconsin Retirement System, supra,* at 23; Wis. Stat. § 40.04(7).

¶25 Unfunded accrued liabilities operate as a debt for employers. [FN66] For accounting purposes, they are listed as an asset--that is, as a receivable--of the system. [FN67]

FN66. Wis. Stat. § 40.05(2)(b); Stipulation of Facts at ¶¶31-32 (citing Wis. Stat. § 40.05(2)(b) and describing unfunded liabilities as "owed to the WRS" and a "debt"); *Wisconsin Retirement System, supra,* at 39.

FN67. Wisconsin Department of Employee Trust Funds, *Comprehensive Annual Financial Report* 24 (1998).

E. Employee Accumulation Reserve

¶26 The employee accumulation reserve holds the funds contributed by or on behalf of employees. [FN68] For purposes of this litigation, the account balance of the employee reserve is just short of $10 billion. [FN69] Unlike the employer reserve, the employee reserve contains individual accounts for each active and inactive employee. [FN70] All employee contributions, including the percentage of earnings mandated by statute and any additional voluntary contributions, are credited to each employee's individual account. [FN71] Even if an employer picks up contributions on behalf of the employee, the contributions are credited to the employee's individual account. [FN72] The funds in the employee reserve are invested in both the fixed and variable trusts, depending upon whether an employee has chosen to invest a portion of the contributions for

him or her in the variable trust. [FN73]

FN68. Wis. Stat. § 40.04(4)(a); Stipulation of Facts at ¶14; *Wisconsin Retirement System, supra,* at 23.

FN69. Stipulation of Facts at ¶12.

FN70. Wis. Stat. § 40.04(4)(a); *Wisconsin Retirement System, supra,* at 23; Stipulation of Facts at ¶16.

FN71. Wis. Stat. § 40.04(4)(a); *Wisconsin Retirement System, supra,* at 23.

FN72. Wis. Stat. § 40.04(4)(a); *Wisconsin Retirement System, supra,* at 37; Stipulation of Facts at ¶14.

FN73. *Wisconsin Retirement System, supra,* at 23; Wis. Stat. § 40.04(4)(a)2. and (7).

F. Annuity Reserve

¶27 The third pertinent account is the annuity reserve. [FN74] For purposes of this litigation, the annuity reserve has a balance of $14.8 billion. [FN75] The annuity reserve holds funds for employees who choose to accept an annuity instead of a lump-sum payment upon leaving public service. [FN76] Most long-term employees choose some form of annuity when leaving public employment. [FN77]

FN74. Wis. Stat. § 40.04(6); Stipulation of Facts at ¶14.

FN75. Stipulation of Facts at ¶12.

FN76. *Wisconsin Retirement System, supra,* at 24; Stipulation of Facts at ¶14.

FN77. *Wisconsin Retirement System, supra,* at 46. Some employees choose a separation benefit when they leave public employ. This benefit is not an annuity and

is not typical for long-term employees. *Wisconsin Retirement System, supra,* at 46.

¶28 Long-term employees typically choose from a variety of annuity options when leaving public employment. There are three types of annuities: straight life annuity, life annuity with guarantee period, and joint survivorship annuity. [FN78] In addition, two permissible calculation methods lead to two different benefit options, a money purchase plan or a formula benefit plan. [FN79]

FN78. Wis. Stat. § 40.24(1); Wisconsin Retirement System, supra, at 56-57.

FN79. Wis. Stat. § 40.24; Wisconsin Retirement System, supra, at 48.

¶29 The formula benefit plan provides an annuity for a retiring employee based on a percentage of the employee's final average earnings. [FN80] A statutory formula determines an employee's initial annuity. [FN81] Different classes of public employees are eligible for different percentage calculations in determining annuities. [FN82] The WRS has been described as a defined benefit plan to the extent that its participants are eligible to receive a specific retirement benefit calculated to the following formula: (creditable service) x (final average earnings) x (formula multiplier) x (actuarial adjustment for retirement prior to the normal retirement date). [FN83]

FN80. *See* Wis. Stat. § 40.24; Wisconsin Retirement System, supra, at 48-51; *see also* Wis. Stat. § 40.02(33) (defining final average earnings).

FN81. Wis. Stat. § 40.23(2), (2m).

FN82. Wis. Stat. § 40.23(2), (2m); Stipulation of Facts at ¶ 46.

FN83. Stipulation of Facts at ¶8; *see also* Wis. Stat. § 40.23(2) and (2m).

"The WRS is a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan." Stipulation of Facts at § 7. Defined benefit plans are discussed in Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 558-59, 544 N.W.2d 888 (1996). In Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Board, 207 Wis.2d 1, 12, 558 N.W.2d 83 (1997), the court noted that an employee's base annuity, the formula benefit, "is guaranteed by the State."

¶30 The elements of this formula are defined in Chapter 40 of the statutes: "creditable service" is defined in Wis. Stat. § 40.02(17); "final average earnings" is defined in Wis. Stat. § 40.02(33); "normal retirement date" is defined in Wis. Stat. § 40.02(42); the formula multipliers are set out in Wis. Stat. §§ 40.23(2)(b)1-4 and 40.23(2m)(e)1-4. [FN84] Actuarial reductions for early retirement are described in Wis. Stat. §§ 40.23(2)(d) and 40.23(2m)(f). [FN85]

FN84. Stipulation of Facts at ¶8.

FN85. Stipulation of Facts at ¶9.

¶31 The money purchase plan can offer a departing employee a better annuity if accumulated funds can purchase a larger annuity, based on actuarial tables, than a formula benefit. [FN86]

FN86. *See* Wis. Stat. § 40.23(3); *Wisconsin Retirement System, supra*, at 53.

¶32 When an employee leaves public service, a variety of monies are transferred to the annuity reserve to finance the employee's annuity. [FN87] The entire balance of the employee's account in the employee reserve is transferred to the annuity reserve. [FN88] In addition, an amount is credited to the annuity reserve to account for any variable trust participation by the employee, including any employer required contributions arising from variable trust participation by the employee. [FN89] Finally, an amount is transferred from the

employer reserve to the annuity reserve "that when increased by an interest income assumption of 5% annually will fully finance the [employee's] future benefit payments." [FN90] Even after the funds are sent to the annuity reserve, the monies continue to be invested in the fixed trust [FN91] or in the variable trust in the same proportion as prior to the employee leaving public service. [FN92]

FN87. *Wisconsin Retirement System, supra,* at 24; Stipulation of Facts at ¶14.

FN88. *Wisconsin Retirement System, supra,* at 24; Stipulation of Facts at ¶14.

FN89. *Wisconsin Retirement System, supra,* at 26; Stipulation of Facts at ¶14.

FN90. *Wisconsin Retirement System, supra,* at 24.

FN91. *Wisconsin Retirement System, supra,* at 24; Wis. Stat. § 40.04(3) and (7).

FN92. *Wisconsin Retirement System, supra,* at 24; Wis. Stat. § 40.04(3) and (7).

G. Transaction Amortization Account

¶33 The final pertinent account is the transaction amortization account, or TAA. [FN93] For purposes of this litigation, the TAA holds approximately $11.5 billion. [FN94] The TAA functions more as an accounting mechanism than as a receptacle for funds, such as the employer or employee reserves. [FN95] All gains and losses of the fixed trust are credited to the TAA, including both realized and unrealized gains and losses. [FN96] "The purpose of the TAA is to smooth the impact of investment gains or losses on the accounts and reserves of the Fixed Trust." [FN97] Spreading the impact of gains and losses over a period of years, as opposed to absorbing actual investment experiences immediately, tends to create greater predictability for determining the contributions necessary to fund the WRS. [FN98]

FN93. Wis. Stat. § 40.04(3). Stipulation of Facts at ¶14.

FN94. Stipulation of Facts at ¶12.

FN95. Stipulation of Facts at ¶20; *Wisconsin Retirement System, supra*, at 28 (noting accounting effects of TAA).

FN96. Wis. Stat. § 40.04(3)(a); *Wisconsin Retirement System, supra*, at 28; Stipulation of Facts at ¶20.

FN97. *Wisconsin Retirement System, supra*, at 28.

FN98. *Wisconsin Retirement System, supra*, at 28.

¶34 On December 31st of each year, 20 percent of the TAA balance is distributed to the fixed trust. [FN99] This distribution from the TAA is divided proportionately among all the accounts in the fixed trust, including the employee, employer, and the annuity reserves. [FN100] It enables the other accounts in the fixed trust to receive the investment income gained by the fixed trust. [FN101] Prior to 1989, only 7 percent of the TAA was distributed each year. [FN102] However, 1989 Wis. Act 13 changed the distribution to 20 percent at year's close. [FN103]

FN99. Wis. Stat. § 40.04(3)(a); *Wisconsin Retirement System, supra*, at 28; Stipulation of Facts at ¶21.

FN100. Wis. Stat. § 40.04(3)(a); *Wisconsin Retirement System, supra*, at 28; Stipulation of Facts at ¶20.

FN101. Wis. Stat. § 40.04(3)(a); *Wisconsin Retirement System*, supra, at 28; Stipulation of Facts at ¶20.

FN102. Wis. Stat. § 40.04(3)(a) (1987-88); *Wisconsin Retirement System, supra*, at 28; Stipulation of Facts at ¶21.

FN103. Stipulation of Facts at ¶21.

¶35 Twice in the past, the legislature approved legislation providing for special one-time distributions from the TAA, apart from the annual statutory distributions. In 1987, the legislature passed 1987 Wis. Act 27, in which $230 million was distributed from the TAA to the various accounts in the trust. [FN104] Part of the $230 million was distributed to the annuity reserve to fund a special investment performance dividend (SIPD) for a specific group of annuitants. [FN105] Various employee associations successfully challenged the constitutionality of 1987 Wis. Act 27, §§ 436m, 684r, and 688km in Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Board, 207 Wis.2d 1, 8, 558 N.W.2d 83 (1997). The Retired Teachers court did not decide that case, however, on the propriety of the distribution from the TAA. [FN106] Thus, about $74.2 million was distributed to the employee reserve, $77.2 million to the employer reserve, and $78.5 million to the annuity reserve, according to the petitioner's brief in Retired Teachers.

FN104. 1987 Wis. Act 27; *Wisconsin Retirement System, supra,* at 29; Stipulation of Facts at ¶22.

FN105. 1987 Wis. Act 27; *Retired Teachers*, 207 Wis.2d at 8, 558 N.W.2d 83; *Wisconsin Retirement System, supra*, at 29; Stipulation of Facts at ¶22.

FN106. *Retired Teachers*, 207 Wis.2d at 8, 558 N.W.2d 83; Stipulation of Facts at ¶22.

¶36 Two years later, the legislature passed 1989 Wis. Act 13, in which $500 million was distributed from the TAA. [FN107] This legislation did not face a legal challenge. [FN108] The 1989 legislation also distributed money to the employee, employer, and annuity reserves. [FN109] Like the 1987 and 1989 Acts, Act 11 orders a lump sum distribution from the TAA to the accounts and reserves in the fixed trust.

FN107. 1989 Wis. Act 13; *Wisconsin Retirement System, supra*, at 29; Stipulation of Facts at ¶22.

FN108. Stipulation of Facts at ¶22.

FN109. 1989 Wis. Act 13, § 47(2).

II. ACT 11

¶37 This section discusses the history and substance of Act 11.

¶38 Assembly Bill 495 was introduced on October 1, 1999, and referred to the Joint Survey Committee on Retirement Systems. Assembly Bulletin, *Assembly Bill 495,* at 169 (Dec. 31, 2000). On October 4, 1999, the committee held a public hearing on the bill and then took executive action. *Id.* The Assembly Speaker referred the bill to the Assembly Calendar of October 6, 1999, and Assembly Bill 495 was taken up, voted upon, and passed that day. *Id.* The bill was immediately messaged to the Senate, referred to and then withdrawn from the Committee on Senate Organization, and voted upon by the Senate on October 6, 1999. *Id.* On December 16, 1999, the Governor signed the bill into law as 1999 Wisconsin Act 11. *Id.* Early drafts of pension enhancement bills were under review from the beginning of the legislative session. [FN110]

FN110. Legislative Reference Bureau Drafting File for 1999 Wis. Act 11, Legislative History for 1999 Assembly Bill 495.

¶39 Assembly Bill 495 is described in its relating clause as an Act "relating to: benefit improvements, interest crediting, variable annuity option, contribution credits for employers, death benefits, credit for legislative service, recognition of income and capital gains and losses in the fixed retirement investment trust and affecting certain actuarial assumptions and liabilities under the Wisconsin retirement system." Several of these changes require discussion.

A. Benefit Improvements

¶40 The formula multiplier or percentage multiplier

described in §§ 29-30 varies according to employee classification. [FN111] For a protective occupation participant covered by social security, an elected official, and an executive participating employee, the formula multiplier is 2 percent. [FN112] For a protective occupation participant not covered by social security, the formula multiplier is 2.5 percent. [FN113] For all other participants in the WRS, the formula multiplier is 1.6 percent. [FN114]

FN111. Stipulation of Facts at ¶10; Wis. Stat. § 40.23(2)(b) 1-4 and (2m)(e)1-4.

FN112. Wis. Stat. § 40.23(2m)(e)2-3.

FN113. Wis. Stat. § 40.23(2m)(e)4.

FN114. Wis. Stat. § 40.23(2m)(e)1.

¶41 Act 11 increases the formula multipliers for all classes of participating employees in the WRS for creditable service performed *before* January 1, 2000 as follows: [FN115]

FN115. Act 11 affects the formula multiplier only for "participants who are participating employees after March 9, 1984." Wis. Stat. § 40.23(2m).

1) Protective occupation participants not covered by social security, from 2.5 percent to 2.665 percent. [FN116]

FN116. 1999 Wis. Act 11, § 20 (amending Wis. Stat. § 40.23(2m)(e) 4).

2) Protective occupation participants covered by social security, from 2 percent to 2.165 percent. [FN117]

FN117. 1999 Wis. Act 11, § 19 (amending Wis. Stat. § 40.23(2m)(e) 3).

3) Elected officials and executive participating employees, from 2 percent to 2.165 percent. [FN118]

FN118. 1999 Wis. Act 11, § 18 (amending Wis. Stat. § 40.23(2m)(e) 2).

4) Other participants, from 1.6 percent to 1.765 percent. [FN119]

FN119. 1999 Wis. Act 11, § 17 (amending Wis. Stat. § 40.23(2m)(e) 1).

The Act provides that creditable service performed *after* January 1, 2000 shall be calculated according to the prior multipliers. [FN120]

FN120. 1999 Wis. Act 11, §§ 17-20.

¶42 The Act also applies the increased multiplier for past service only to "individuals who are participating employees in the Wisconsin retirement system on January 1, 2000." [FN121]

FN121. 1999 Wis. Act 11, § 28(2).

¶43 Act 11 also raises the benefit cap, namely, the maximum amount of initial retirement annuity guaranteed by the state, for most employees. [FN122] Under the law in place before Act 11, the maximum amount of an initial annuity for a participant in the WRS was 65 percent of the participant's final average earnings. [FN123] The one exception to this rule was for a protective occupation participant not covered by social security whose initial annuity was capped at 85 percent of the participant's final average earnings. [FN124] Act 11 raises to 70 percent the cap for all participating employees who are capped at 65 percent, except for protectives covered by social security, whose initial annuities will continue to be capped at 65 percent. [FN125] It also maintains the 85 percent cap for protectives not covered by social security. [FN126]] For these protectives, the maximum initial annuity cap will stay at 85 percent of final average earnings.

FN122. 1999 Wis. Act 11, § 16.

FN123. Wis. Stat. § 40.23(2m)(b).

FN124. Wis. Stat. § 40.23(2m)(b).

FN125. 1999 Wis. Act 11, § 16.

FN126. 1999 Wis. Act 11, § 16.

¶44 The benefit cap hike applies only to active participating employees in the Wisconsin retirement system on January 1, 2000. [FN127] Thus, by the terms of the Act, the 103,000 "inactive participants" in the WRS--that is, the former participating employees who have not yet become annuitants--are not eligible for either the increase in the multiplier for creditable service "performed before January 1, 2000" or the benefit cap increase made available for two categories of employees. Active participating employees who begin work after January 1, 2000, are ineligible for the increase in the multiplier.

FN127. 1999 Wis. Act 11, § 28(2).

B. Accelerated Distribution of Money from the TAA

¶45 Two of the components of the public employee trust fund are the variable retirement investment trust and the fixed retirement investment trust. [FN128] As noted above, the transaction amortization account is one of the 12 accounts and reserves within the fixed trust. The TAA is maintained and used to smooth out fluctuations in unrecognized gains and losses in the value of fixed trust assets. [FN129] "The balance of the TAA closely parallels the difference between market value and the adjusted book value of the assets." [FN130] Each year, 20 percent of the balance of the TAA is distributed to participating accounts in the fixed trust. [FN131]

FN128. Wis. Stat. § 40.04(3); Stipulation of Facts at ¶12.

FN129. *Wisconsin Retirement System, supra,* at 28;

Stipulation of Facts at ¶¶19-20.

FN130. Legislative Reference Bureau Drafting File for 1999 Wis. Act 11, Legislative History for 1999 Assembly Bill 495.

FN131. Wis. Stat. § 40.04(3)(a); Stipulation of Facts at ¶21.

¶46 Act 11 provides that on December 31, 1999, $4 billion is to be distributed from the TAA to the reserves and accounts in the fixed trust in amounts equal to the percentage of the total distribution determined by dividing each reserve's and account's balance on January 1, 1999, by the total balance of the fixed trust on January 1, 1999. [FN132] Most of the $4 billion distribution is to be sent arithmetically into the employee, employer, and annuity reserves. [FN133]

FN132. 1999 Wis. Act 11, § 27(1)(a).

FN133. These three reserves constitute the vast majority of the fixed trust balance and therefore the pro rata distribution language in § 27(1)(a) of Act 11 will cause most of the $4 billion to enter these three accounts. Stipulation of Facts at ¶12.

¶47 A portion of the $4 billion distribution will fund the benefit improvements created by Act 11. Hence, the $4 billion distribution helps both employers and participating employees. Money distributed to the employee reserve will enhance the individual accounts of some of the inactive participants in the reserve. Money distributed to the annuity reserve will produce a substantial increase in annual annuity payments.

C. $200 Million Credit

¶48 Act 11 also provides that $200 million of the increase in the employer reserve resulting from the $4 billion distribution will be used to establish employer contribution credits to help satisfy required payments that employers have for unfunded liabilities. [FN134] These credits have the effect of reducing

employer debt for unfunded liabilities, thereby permitting a suspension of payments for unfunded liability. [FN135] Employers who have already paid off their unfunded liability or who have credits in excess of such unfunded liability can suspend payment of the employer required contributions until their respective credits are exhausted. [FN136] All employers who are part of the WRS will benefit from the contribution credits. [FN137] After an employer's credits have been exhausted, the employer is required to resume payments to satisfy required contributions and any remaining unfunded liability. [FN138]

FN134. 1999 Wis. Act 11, § 27(1)(b)1; Stipulation of Facts at ¶57.

FN135. 1999 Wis. Act 11, § 27(1)(b)1; Stipulation of Facts at ¶57.

FN136. 1999 Wis. Act 11, § 27(1)(b)1; Stipulation of Facts at ¶57. The estimated suspension period for payments ranges from 19.6 months on average for school districts to 58.2 months on average for special districts. The estimated payment suspension period for the State is 22.1 months.

FN137. 1999 Wis. Act 11, § 27(1)(b)1; Stipulation of Facts at ¶57.

FN138. 1999 Wis. Act 11, § 27(1)(b)1; Stipulation of Facts at ¶57.

D. Actuarial Assumptions

¶49 As noted above, employer required contribution rates, expressed as a percentage of payroll, are determined as part of each annual actuarial evaluation of the WRS. One of the actuarial assumptions considered is the "assumed rate," defined in Wis. Stat. § 40.02(7). [FN139] The statutory assumed rate was initially set at 7.5 percent, although, as authorized, the ETF Board changed the assumed rate to 8 percent in 1992. [FN140] Act 11 amends § 40.02(7) so that the new statutory assumed

rate is 8 percent. [FN141] Another actuarial assumption is the assumption for across-the-board salary increases. [FN142] This assumption, also set out in § 40.02(7), has been statutorily set at 1.9 percent less than the assumed rate. [FN143] However, as authorized, the ETF Board has revised the across- the-board salary assumption several times, moving it to 4.8 percent in 1998. [FN144] Act 11 amends the 1.9 percent in § 40.02(7) to 3.4 percent. [FN145] This produces a statutory assumption for across-the-board salary increases of 4.6 percent (8 percent less 3.4 percent). [FN146]

FN139. Stipulation of Facts at ¶29.

FN140. Stipulation of Facts at ¶29; *see also* Wisconsin Retirement System, supra, at 32.

FN141. 1999 Wis. Act 11, § 5.

FN142. Stipulation of Facts at ¶30.

FN143. Wis. Stat. § 40.02(7); Stipulation of Facts at ¶30.

FN144. Stipulation of Facts at ¶30.

FN145. 1999 Wis. Act 11, § 5.

FN146. 1999 Wis. Act 11, § 5.

¶50 Both of these actuarial changes may affect employer and employee required contributions. [FN147] Nonetheless, the ETF Board retains the authority in Wis. Stat. § 40.02(7) to change the rates "due to changed economic circumstances" when the actuary so recommends. Moreover, Act 11 provides, in a non-statutory provision (Section 27(3)) that: "Notwithstanding any provision in this act, the employee trust funds board shall retain the authority to maintain proper actuarial funding of the Wisconsin retirement system."

FN147. Wisconsin Retirement System, supra, at 38 43.

¶51 For purposes of this litigation, the present unfunded liability for all employers totals approximately $2.2 billion. [FN148] In the past, the unfunded liability of employers has been recalculated following adjustments to the actuarial assumptions that govern overall funding requirements for the WRS. [FN149] In 1989, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.5 percent to 7.8 percent, the DETF recalculated the remaining unfunded liability using the new assumed rate. [FN150] As a result, the aggregate unfunded liability of all employers as carried on DETF's books, was reduced by $90,589,521. [FN151] In 1991, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.8 percent to 8.0 percent, the DETF recalculated the remaining unfunded liability using the new assumed rate. [FN152] As a result, the aggregate unfunded liability of all employers as carried on DETF's books, was reduced by $59,477,500. [FN153] No legal challenge to these actions was made. [FN154] In 1994, when the actuary recommended (and the ETF Board approved) changing the across-the-board salary increase assumption from 5.6 percent to 5.3 percent, the DETF recalculated the remaining unfunded liability of employers, using the new salary increase assumption. [FN155] As a result, the aggregate unfunded liability of all employers as carried on DETF's books was reduced by $85,117,420. [FN156] No legal challenge to this action was made. [FN157]

FN148. Stipulation of Facts at ¶32.

FN149. Stipulation of Facts at ¶33; Wisconsin Retirement System, supra, at 31-32, 40.

FN150. Stipulation of Facts at ¶33.

FN151. Stipulation of Facts at ¶33.

FN152. Stipulation of Facts at ¶33.

FN153. Stipulation of Facts at ¶33.

FN154. Stipulation of Facts at ¶33.

FN155. Stipulation of Facts at ¶33.

FN156. Stipulation of Facts at ¶33.

FN157. Stipulation of Facts at ¶33.

¶52 In February 1998, however, the Secretary of DETF asked the Attorney General whether the ETF Board had authority to adjust unfunded liability, to reflect later adjustment to actuarial assumptions. [FN158] On January 15, 1999, Assistant Attorney General Jane Hamblen replied on behalf of the Attorney General, stating that there was no statutory authority for the ETF Board to adjust the unfunded liability balance of employers even when the WRS actuary subsequently recommended changes in the actuarial assumptions that were used when the initial unfunded liability balance was determined . [FN159] Since receipt of this reply, the ETF Board has not made any recalculations of the unfunded liability balance. [FN160]

FN158. Stipulation of Facts at ¶34.

FN159. Stipulation of Facts at ¶34.

FN160. Stipulation of Facts at ¶34.

¶53 Act 11 authorizes DETF to adjust the unfunded liability balance of the WRS and of each employer to reflect changes in certain assumptions used to value the liabilities of the WRS, if the actuary recommends and the ETF Board approves the changes. [FN161]

FN161. 1999 Wis. Act 11, § 15 (creating Wis. Stat. § 40.05(2)(cm)).

III. PROCEDURAL HISTORY

¶54 Seven days after Governor Tommy Thompson signed Assembly Bill 495 into law, the Employee Trust Funds Board,

the Department of Employee Trust Funds, and Eric O. Stanchfield, Secretary of the Department of Employee Trust Funds, filed in this court a petition for preliminary injunction, or, alternatively, a writ of prohibition, to block implementation of Act 11. The three petitioners also filed a petition for leave to commence an original action and to have their petition stand as a complaint seeking declaratory judgment. They named as respondents Secretary Lightbourn and State Treasurer Voight. Five days later, on December 28, 1999, WEAC moved to intervene as a respondent. On December 29, 1999, we preliminarily enjoined implementation of the Act, which was scheduled to take effect the following day. In our order, we directed the Wisconsin Department of Administration to respond to the Board's petition.

¶55 On January 12, 2000, the court modified its order and required, among other things, memoranda on whether the petitioners had standing to question the constitutionality of the Act and whether realignment of the parties would be required to provide for parties with proper standing to challenge and defend the constitutionality of the Act.

¶56 On January 28, 2000, WPPA and SEA separately moved to intervene as petitioners, also asking for leave to commence an original action.

¶57 On February 10, 2000, we ruled that the ETF Board's petition was not proper because the Board had no authority as a state agency to challenge the constitutionality of Act 11. *See* Columbia County v. Bd. of Trustees of Wis. Ret. Fund, 17 Wis.2d 310, 317-19, 116 N.W.2d 142 (1962). At the same time, we granted all motions to intervene, ordered the proposed complaint of WPPA to serve as the complaint in this action, and designated WPPA and SEA as petitioners. Lightbourn, Voight, and WEAC were designated as respondents. We ordered the parties to prepare a stipulation of facts and appointed Reserve Circuit Judge Michael J. Barron to oversee the process of preparing the stipulation. Ultimately, Judge Barron's findings of fact, based upon the stipulation, were filed with the court on April 10, 2000. In the meantime, we granted SEA permission to supplement the WPPA complaint with its own claims.

¶58 On May 25, 2000, we accepted original jurisdiction of this case.

¶59 WPPA and SEA make the following claims:

1. WPPA contends that the $4 billion distribution from the TAA violates Wis. Stat. § 40.19(1) and is an unconstitutional taking of property and an unconstitutional impairment of contract.

2. WPPA and SEA contend that the $200 million portion of the total funds distributed to the employer reserve and earmarked as a credit for employers against unfunded liability, violates Wis. Stat. § 40.19(1) and is an unconstitutional taking of property and an unconstitutional impairment of contract.

3. WPPA and SEA contend that the legislative modifications to the statutory assumed rate and the statutory across-the-board salary increase rate usurp the ETF Board's authority, thereby impairing their contract rights under Wis. Stat. § 40.19(1), and that the rate changes are otherwise unconstitutional.

4. WPPA contends that raising the 65 percent benefit cap by 5 percent for all employees except protective occupation employees violates the equal protection clause of the United States Constitution and Article I, Section 1 of the Wisconsin Constitution.

5. SEA contends that Act 11 is unconstitutional because it failed to pass the Wisconsin legislature by a three-fourths vote of all the members elected to both houses of the legislature and it fails to provide sufficient state funds to cover the cost of increased benefits as required by Article IV, Section 26 of the Wisconsin Constitution.

IV. ANALYSIS

¶60 Before we examine each of the claims presented to this court, we reaffirm the legal standards guiding our decision.

¶61 The court entertains this original action pursuant to our authority under Article VII, Section 3(2) of the Wisconsin Constitution. The petitioners ask this court to issue a declaratory judgment that certain portions of Act 11 are unconstitutional. [FN162]

> FN162. None of the parties has argued that this matter is not sufficiently justiciable for declaratory relief. We need not address in detail, therefore, the four-part justiciability test this court has developed to measure the appropriateness of declaratory relief. *See* Miller Brands-Milwaukee, Inc. v. Case, 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991). Nevertheless, we find that this matter is rightly before the court as an action for declaratory judgment.

¶62 To succeed in a challenge to the constitutionality of Act 11, the petitioners must show that the Act is unconstitutional beyond a reasonable doubt. Retired Teachers, 207 Wis.2d at 18, 558 N.W.2d 83; State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis.2d 32, 46, 205 N.W.2d 784 (1973).

¶63 When a court examines the constitutionality of a statute, it is not concerned with the wisdom of the legislative enactment. Hammermill Paper Co., 58 Wis.2d at 47, 205 N.W.2d 784. A court is "judicially concerned only when the statute clearly contravenes some constitutional provision." Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 415-16, 147 N.W.2d 633 (1967) (citing Chicago & N.W. Ry. Co. v. La Follette, 27 Wis.2d 505, 521, 135 N.W.2d 269 (1965)). When a court reviews the constitutionality of a statute, it scrutinizes an exercise of power by a separate branch of state government. Our review is independent but deferential. Our duty is to uphold a legislative act if at all possible. Hammermill Paper Co., 58 Wis.2d at 47, 205 N.W.2d 784; Gottlieb, 33 Wis.2d at 415, 147 N.W.2d 633.

¶64 Our duty to uphold legislation whenever possible is embodied in the principle that every legislative act is presumed constitutional. Hammermill Paper Co., 58 Wis.2d at 47, 205

N.W.2d 784 (citing Gottlieb, 33 Wis.2d at 415, 147 N.W.2d 633). Thus, "wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." Id. at 46, 205 N.W.2d 784. "If there is any reasonable basis upon which the legislation may constitutionally rest, the court must assume that the legislature had such fact in mind...." State ex rel. Carnation Milk Prods. Co. v. Emery, 178 Wis. 147, 160, 189 N.W. 564 (1922).

A. Three-Fourths Vote

¶65 *SEA contends that Act 11 is unconstitutional because it failed to pass the Wisconsin legislature by a three-fourths vote of all the members elected to both houses of legislature.*

¶66 SEA raises what we regard as a threshold issue: whether 1999 Assembly Bill 495 failed to pass the Wisconsin legislature by a three-fourths vote of all the members elected to both houses of the legislature, contrary to Article IV, Section 26 of the Wisconsin Constitution. SEA's challenge threatens the validity of the entire Act and, consequently, it must be addressed first.

¶67 Article IV, Section 26 of the Wisconsin Constitution provides in relevant part as follows:

> (1) The legislature may not grant any extra compensation to a public officer, agent, servant or contractor after the services have been rendered or the contract has been entered into.
>
> ...
>
> (3) Subsection (1) shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature and such act provides for sufficient state funds to cover the costs of the increased benefits.

¶68 The text of Article IV, Section 26 raises several questions of interpretation that require us to review the history of the section, which has been amended five times since its inclusion as part of the original constitution.

¶69 At the beginning of the last century, Article IV, Section 26 consisted of a single sentence:

> Extra compensation. Section 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office.

¶70 In 1921, the legislature approved a Teachers' Retirement Act that contained several features of the present retirement system. Ch. 459, Laws of 1921. The act provided pensions for teachers already in service and computed the pensions to reflect the teachers' entire service before and after enactment of the law. When the act was challenged in our court, the question presented was whether the credit for past service for teachers still employed was "extra compensation" in violation of Section 26. This court concluded that the purpose of the law was to promote a higher efficiency in the state's educational system by retaining seasoned and experienced teachers. State ex rel. Dudgeon v. Levitan, 181 Wis. 326, 339, 193 N.W. 499 (1923). The court explained that enactment of a pension system would attract future entrants into the teaching profession, but failure of that pension system to consider past service by teachers already working would generate dissatisfaction, "causing the older teachers either to drop out of the service or to continue in service with abated interest and devotion." Id. at 341, 193 N.W. 499. The court observed:

> We do not think it necessarily follows that because the legislature, in its attempt to construct an enduring and efficient pension

> system, saw fit to base the annuity which teachers already in service are to be awarded in part upon the service rendered prior to the enactment of the law, it was its dominant purpose or intent to award such teachers extra compensation for services already rendered.

Id. at 342, 193 N.W. 499. The court went on:

> As we view it, the annuity based on past service is not intended to be, or operate as, compensation for past service. It was rather intended to be, and in fact is, an inducement to the seasoned and experienced teacher to remain in the service and give the public the benefit of his experience. We think there was plenty of room for the legislature to determine that the ultimate success of the pension system itself required special consideration of those constituting the educational forces of the state at the time of the enactment of the law, not as compensation for prior service but rather as an inducement to them to remain in the service, to the great benefit of our educational institutions.

Id. at 343, 193 N.W. 499.

¶71 Three decades after Dudgeon, the court was confronted with a more difficult question: whether the legislature could appropriate funds to increase retirement benefits for teachers "who had retired before June 30, 1951." State ex rel. Thomson v. Giessel, 262 Wis. 51, 65, 53 N.W.2d 726 (1952) (Giessel I). This legislative plan was retroactive; no future service was required of the retired teachers to qualify for the pension increase. The court concluded that the plan was unconstitutional, stating that the effect of the law was "to grant extra compensation to public servants after the services are rendered ... in violation of sec. 26, art. IV of the state constitution." Id. The court added:

> It has not escaped the attention of the court that

> a decision sustaining an increase of benefits for already retired teachers would clear the way for legislation increasing benefits for all public employees, including judges, granted by the legislature from time to time after their retirement, and such a decision would be consonant with the selfish interests of the court. Nevertheless, as we read sec. 26, art. IV, Const., this would involve an exception to a clear and unmistakable command. *If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution.*

Id. at 64, 53 N.W.2d 726 (emphasis added).

¶72 Justice George Currie dissented from the decision, writing:

In my opinion the time has come when this court should take one further forward step ... and declare that sec. 26, art. IV of the constitution, has no application to pension or annuity benefit pay to retired public servants pursuant to a genuine retirement system embodying an otherwise valid statute or ordinance serving a public purpose.

> To hold, as the majority does, that the state is powerless to increase retirement benefits to retired public servants ... is to place all retirement systems for public servants in a strait jacket, thus rendering it impossible that such retirement benefits shall serve the original purpose intended.

Id. at 66, 53 N.W.2d 726 (Currie, J., dissenting).

¶73 The legislature responded to the *Giessel I* decision by passing a law directed to "emergency substitute teachers," that is, retired teachers who signed up for potential service as substitutes. *See* § 2, ch. 434, Laws of 1953. The law compensated retired teachers for making themselves available for service as substitutes, whether or not they actually served,

and the compensation for that potential service was essentially the same as the compensation struck down in Giessel I. In State ex rel. Thomson v. Giessel, 265 Wis. 558, 61 N.W.2d 903 (1953) (Giessel II), the court upheld the legislature's plan, dismissing the contention that the new law was a subterfuge. The law required retired teachers to sign up for future service as a prerequisite for the "compensation." This tie to future service saved the legislation. "The act must be construed as authorizing a contract by which the state rehires retired teachers.... The payments provided by the act are not intended to be compensation for past services." Giessel II, 265 Wis. at 565-66, 61 N.W.2d 903.

¶74 Before the second Giessel decision was issued, the legislature commenced work on a constitutional amendment, as suggested in Giessel I. The amendment eventually added the following sentence to Article IV, Section 26 of the Constitution:

> This section shall not apply to increased benefits for teachers under a teachers' retirement system when such increased benefits are provided by a legislative act passed on a call of the yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature.

¶75 This 1956 amendment introduced two new concepts to Section 26. One was the concept of "increased benefits ... under a ... retirement system." The second was "a legislative act" passed "by a three-fourths vote of all the members elected to both houses of the legislature."

¶76 Teachers were not the only object of legislative concern. For instance, beginning in 1945, the legislature made counties with a population of less than 500,000 eligible to join the Wisconsin Retirement Fund. Columbia County, 17 Wis.2d at 313-14, 116 N.W.2d 142; Wis. Stat. § 66.90(4) (1945). By 1961, more than 40 counties had done so. Columbia County, 17 Wis.2d at 314, 116 N.W.2d 142. In 1961, the legislature mandated that all remaining counties with a population of less than 500,000 be brought into the system. § 2, ch. 459, Laws of

1961. Inevitably, this meant recognition of prior service by continuing employees. Because of the cost this would entail, state aids were provided to all counties participating in the fund that had heavy property tax levies for contributions to the fund. Columbia County, 17 Wis.2d at 314, 116 N.W.2d 142.

¶77 Eight counties resisted the new legislation, and some of their taxpayers challenged the law. Id. at 313, 116 N.W.2d 142. They argued in part that the 1961 law constituted a grant of extra compensation to public officers, agents, or servants after their services had been rendered. Id. at 326, 116 N.W.2d 142. The taxpayers objected to the legislature's mandatory subjection of the counties to the fund, requiring contributions from taxes to support retirement benefits. They said that withholding state aids if contributions were not paid as well as providing reimbursement aids to assist certain counties in making payment amounted to "a legislative grant of extra compensation." Id.

¶78 The court declared that "sec. 26, art. IV, does not apply to counties." Id. It ruled that state aids for contributions to the fund were not extra compensation by the state. Id. at 327, 116 N.W.2d 142. It rejected the argument that "some future service is necessary in consideration for the payment of past-service credits." The court said:

> The basic answer lies in the concept that contributions made to the pension fund are not compensation, much less extra compensation paid to public officers, agents, or servants. The payment of contributions may ultimately under some conditions inure to the benefit of the employee in the form of a pension benefit but this is not absolute or necessarily so and does not amount to compensation as that term is used in sec. 26, art. IV of the constitution.

Id. at 327-28, 116 N.W.2d 142.

¶79 The 1962 Columbia County decision, written by Justice E. Harold Hallows, was unanimous. In effect, it embraced the

argument that Justice George Currie had made in Giessel I ten years earlier.

¶80 In 1974, however, Article IV, Section 26 was amended again. The sentence added in 1956 was modified to read:

> This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits.

¶81 The 1974 amendment made several changes to Section 26. First, it struck out the word "teachers" and replaced it with the phrase "persons who have been or shall be granted benefits." Second, it modified the word "benefits" with the additional phrase "of any kind." Third, it struck out the word "teachers' " before the term "retirement system" so that "retirement system" thereafter appeared in the text without qualification. Fourth, it added the clause "which act shall provide for sufficient state funds to cover the costs of the increased benefits." The fourth change was added as a floor amendment; it was not part of the original proposal. *See* Senate Amendment 1 to 1971 Senate Joint Resolution 3.

¶82 Although Section 26 has been amended on three other occasions--in 1967, 1977, and 1992--the other amendments are not relevant to the current litigation.

¶83 SEA contends that Act 11, by providing increased benefits, "including" the increase in benefit multipliers and the cap increase for the initial formula-based annuity for most active participants, violates Section 26 because it did not pass the legislature on a call of ayes and noes by "a three-fourths vote of all the members elected to both houses of the legislature." [FN163] Wis. Const. art. IV, § 26. Another relevant provision is the $4 billion recognition from the TAA

because it has the effect of sending approximately $1.064 billion into the employee accumulation reserve account to increase the accounts of both active and inactive participants who are not annuitants, and about $1.608 billion into the annuity reserve to increase annuities for annuitants. [FN164] This latter increase is treated as a permanent increase in the annual annuity payment unless the system experiences such serious difficulty at some point that it is unable to continue to pay the increment. [FN165] This increase is not guaranteed by the state, but it is not expected to decline unless the system becomes troubled.

FN163. Petitioner SEA's brief at 46.

FN164. Gabriel, Roeder, Smith & Company, *Wisconsin Retirement System Actuarial Valuations of Benefit and Financing Provisions of Assembly Bill 495* 8 (Nov.1999) (prepared for the Joint Survey Committee on Retirement Systems).

FN165. *Wisconsin Retirement System, supra,* at 68-69; *see also* Wis. Stat. § 40.27(2)(c).

¶84 Respondents argue that Article IV, Section 26 is inapplicable to Act 11. [FN166] Respondents Lightbourn and Voight argue that subsection (1) of the section does not serve as a bar to increased benefits for persons currently employed.

FN166. Respondents Lightbourn and Voight's brief at 88.

The benefits about which SEA complains are not constitutionally infirm. They are granted only to those currently employed. As such, they are not subject to the provisions of Wis. Const. art. IV, § 26, which is limited in its application to benefits for those no longer in government employment. [FN167]

FN167. Respondents Lightbourn and Voight's brief

¶85 Respondent WEAC adds that: "If the benefit

improvements enacted by the legislature do not violate subsection (1), the exception in subsection (3) does not come into play. Act 11 does not violate subsection (1) as it only provides benefits to those who remain in covered employment after the passage of Act 11." [FN168]

FN168. Respondent WEAC's brief at 69.

¶86 WEAC relies on Dudgeon, 181 Wis. 326, 193 N.W. 499, Giessel I, 262 Wis. 51, 53 N.W.2d 726, Giessel II, 265 Wis. 558, 61 N.W.2d 903, and Columbia County, 17 Wis.2d 310, 116 N.W.2d 142, in reaching the same conclusion as Lightbourn and Voight. [FN169]

FN169. Respondent WEAC's brief at 70-74.

¶87 The difficulty with this analysis is that the cases cited predate the 1974 constitutional amendment. Moreover, there is minimal discussion in the WEAC brief of de facto benefit increases for annuitants--persons who have already retired--and for some non-annuitants who are no longer active participating employees. It is not self-evident that a constitutional provision that addresses "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act" has no application whatever to Act 11. Considering the history of pension litigation in the last century, it is at least arguable that the 1956 and 1974 amendments to Article IV, Section 26 have caused Section 26(3) to apply to both prospective and retroactive benefit increases for participants in the WRS.

¶88 This court is being invited to hold (1) that Section 26 has no application to future benefit increases voted by the legislature, regardless of the unfunded liability created by the increases, and (2) that Section 26 has no application to annuity increases voted by the legislature so long as the money to pay for the annuity increases comes out of trust funds. If we so rule, we necessarily determine that these species of benefit increases require only a majority vote in each house of the legislature.

¶89 In the case at hand, we are not required to determine the scope of Section 26 coverage *if* 1999 Assembly Bill 495 "passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature."

¶90 The State Assembly now has 99 elected members. [FN170] The State Senate has 33 elected members. The parties have stipulated that Assembly Bill 495 passed the Assembly on October 6, 1999, by a vote of 79 ayes and 20 noes, and it passed the Senate the same day by a vote of 23 ayes and 10 noes. The parties stipulate that "AB 495 did not pass the Senate by a three-fourths vote." [FN171]

> FN170. In 1956, at the time the three-fourths vote amendment passed, the Assembly had 100 members. *See* Wis. Stat. § 4.01 (1957).
>
> FN171. Stipulation of Facts at ¶52.

¶91 The legislature has approved Joint Rules covering procedural matters of interest to both houses. Joint Rule 12 provides in part:

> JOINT RULE 12. Required vote total. (1) Unless a different and higher total vote is required by the state constitution for a specific action, all questions are decided by a majority of a quorum.
>
> 2) As required by the state constitution, each of the following bills requires such higher affirmative vote total for passage (or concurrence) in either house. The vote shall be taken by ayes and noes and shall be so recorded in the journal.
>
> (a) Three-fourths of all members elected to each house are necessary to approve any bill to grant increased retirement fund benefits under section 26 of article IV of the constitution.

State of Wisconsin Joint Rules 8 (1999) (as last affected by 1999 A.J.R. 18) [hereinafter Joint Rule 12].

¶92 The language in Section 26 under scrutiny is "three-fourths vote of all the members elected to both houses of the legislature." Joint Rule 12 interprets this language to mean a vote of "[t]hree-fourths of all members elected to each house." Joint Rule 12(2)(a).

¶93 Joint Rule 12 serves as a valuable interpretation of the constitution by the legislative branch. Ultimately, however, the judiciary must determine what the law is. We note that the language in Section 26 is different from at least one other provision of the constitution requiring an extraordinary vote. Article VII, Section 13 provides that a "justice or judge may be removed from office by address of both houses of the legislature, if two-thirds of all the members elected to *each* house concur therein" (emphasis added). *See also* Wis. Const. art. VIII, §§ 6 and 7(2)(e), and art. XII, § 1 (provisions that refer to "each house"). Thus, the issue before us is whether a bill subject to Article IV, Section 26(3) requires passage by a vote of three-fourths of all members elected to *each* house, or whether the requisite total may be obtained by adding the votes in each house to equal three-fourths of the total membership of both houses.

¶94 The 1956 constitutional amendment that included the three-fourths vote provision began as Senate Joint Resolution 21 in the 1953 session. The Joint Resolution was introduced on March 1, 1953, at the request of Senator Charles Brees. The resolution described the proposed amendment as an amendment "relating to extra compensation of public officers and employees." [FN172] The original resolution contained the following clause: "unless such extra compensation or increase or decrease in compensation is agreed to, on a call of yeas and nays, by three-fourths of all the members elected to *each* house of the legislature." 1953 S.J.R. 21 (emphasis added). A subsequent Senate amendment changed the text to: "This section shall not apply to increased benefits for teachers under a teachers' retirement system when such increased benefits are provided by a legislative act passed on a call of yeas and nays

by a three-fourths vote of all the members elected to *both* houses of the legislature." Senate Substitute Amendment 1 to 1953 S.J.R. 21 (emphasis added).

> FN172. The relating clause of the joint resolution remained intact throughout the legislative process.

¶95 We think the language change is significant. Inasmuch as the resolution began with language referring to "three-fourths vote of all the members elected to each house" and ended with language referring to "three- fourths vote of all the members elected to both houses," we conclude that the legislature intended to permit passage of a bill increasing benefits under a retirement system when the bill has received the votes of three-fourths of the entire elected membership of the legislature. This three-fourths vote does not, however, replace the requirement elsewhere in the constitution that a bill must pass each house before it may be sent to the governor to become law. It adds to that requirement.

¶96 Given our interpretation of Section 26, if each house of the legislature were to comply with Joint Rule 12, there would not be a dispute about whether a retirement bill had received the requisite number of votes. [FN173] However, if either house did not comply with Joint Rule 12, it would prevent the other house from passing the bill unless the other house were able to muster the difference between 99 total votes and the majority vote in the first house ... even though three-fourths of the members of the second house had approved the bill.

> FN173. By its terms, Joint Rule 12 requires 75 votes in the Assembly and 25 votes in the Senate to approve a bill to grant "increased retirement fund benefits under section 26 of article IV of the constitution."

¶97 In this case, we conclude that because Assembly Bill 495 received 79 votes in the Assembly and 23 votes in the Senate, the bill received a total of 102 votes from the members elected to both houses of the legislature, and that number is more than the three-fourths vote required by Section 26 of the constitution.

¶98 Before examining each of the petitioner's substantive challenges, we turn to a discussion of participant interests and the rights that flow from them.

B. Participant Rights

¶99 The WRS has approximately 460,000 participants. A participant is defined as "any person included within the provisions of the Wisconsin retirement system by virtue of being or having been a participating employee whose account has not been closed." Wis. Stat. § 40.02(45).

¶100 Every participant has interests and rights in the Wisconsin retirement system. Every participant is either an annuitant or a potential annuitant (with an individual account in the employee reserve). Thus, each participant has a property interest in his or her annuity or individual account, and a right to protect that interest. Beyond this narrow individual interest, each participant has a broad property interest in the WRS as a whole. [FN174]

> FN174. Retired Teachers, 207 Wis.2d at 19, 558 N.W.2d 83 (citing Ass'n of State Prosecutors, 199 Wis.2d at 558, 544 N.W.2d 888).

¶101 Participants fall into several categories and multiple subcategories. As a result of their status, different participants have different interests. Active participating employees share many interests in common with annuitants and "inactive participants" who are not yet eligible to receive an annuity. But participants in one category might strongly oppose a proposalin the legislature or an action by the ETF Board that participants in another category would find quite satisfactory. As an example, annuitants might be pleased if the legislature distributed all money in the TAA to the various accounts and reserves in the fixed trust because such a distribution would produce a short-term bonanza for them from the money sent to the annuity reserve. However, many active participating employees would view such a move as destructive to their position for the future. Correspondingly, some active

participating employees might prefer to limit or stop distributions from the TAA ... until they were ready to retire. Locking up the TAA would not please current annuitants, however, especially when investments are doing well.

¶102 Participants have different property interests. An active participating employee has a clear property interest in his or her own account, but that same employee has no property interest in a retiree's annuity. Each annuity belongs to the annuitant.

¶103 The principle that different participants have different property interests is illustrated in two recent cases. In Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 552, 544 N.W.2d 888 (1996), this court said: "We hold that vested employees and retirees have protectable property interests in their retirement trust funds which the legislature cannot simply confiscate under the circumstances of this case."

¶104 The court's choice of language was careful and deliberate. It implied that employees and former employees who are part of the same system do not all have the same interests or the same rights. The court held that 42 former assistant district attorneys of Milwaukee County who chose to become part of the WRS after assistant district attorneys became state employees did not have a property interest that would permit them to remove money from the Milwaukee County employee retirement system to fund past service credit in the WRS. The court said they did not have a property interest because they were not vested in the Milwaukee County system. If they had been vested, they might have remained in the Milwaukee system. By contrast, Milwaukee County employees who were vested in the Milwaukee system had a right to prevent money from being taken out of that system for non-trust purposes. [FN175]

> FN175. We never suggested that the 42 former assistant district attorneys would not have rights in the future if they rejoined the county's work force. We never said that the attorneys would have no standing to protect the Milwaukee system if it were being grossly mismanaged.

¶105 A second example of diverse legal interests in property appeared in Retired Teachers, 207 Wis.2d 1, 558 N.W.2d 83. The 1987 legislature approved a special investment performance dividend (SIPD) as part of a $230 million distribution from the TAA.1987 Wis. Act 27. The targeted recipients of the dividend were pre-1974 annuitants who were included in the annuity reserve. These pre-1974 annuitants received less benefits than post-1974 annuitants because their base annuities were not improved as a result of post-1974 formula enhancements. Because of the discrepancy in benefits among annuitants, the legislature attempted to use money in the TAA to enhance the annuities of roughly 25 percent of the entire class of annuitants--at the expense of 75 percent of the same class. We held unanimously that this legislative action constituted a taking from the annuitants who received no benefits. The court said: "[W]e must determine whether the SIPD legislation 'takes' the *plaintiff annuitants* ' property interest in having annuity reserve account surpluses distributed in the manner prescribed by § 40.27(2). To the extent that the legislation violates the plaintiffs' § 40.27(2) rights, it effectively takes those rights." Retired Teachers, 207 Wis.2d at 20, 558 N.W.2d 83 (emphasis added).

¶106 Our court found the 1987 legislation deficient in several respects, but we did not state or imply that any participant other than a post-1974 *annuitant* could claim a "taking." No participant other than an annuitant had any property interest in the annuity reserve.

¶107 Four decades ago, this court said that teachers have "a contractual relationship with the state and a vested right in the state teachers' retirement system." State Teachers' Ret. Bd. v. Giessel, 12 Wis.2d 5, 9, 106 N.W.2d 301 (1960) (Giessel III). These general principles are sound. Our task is to restate them in a contemporary context, attempting to articulate a more complete statement of the property interests and rights enjoyed by participants.

1. Wisconsin Stat. § 40.19(1)

¶108 The first source of property interests and rights is Wis. Stat. § 40.19, which is entitled "Rights preserved." This section applies not only to the WRS but also to the entire public employee trust fund. Wisconsin Stat. § 40.19(1) reads as follows:

> 40.19 Rights preserved. (1) Rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

¶109 We note that the first sentence of subsection (1) uses the word "employee." The last sentence uses the word "participant." We do not think the word "employee" in the subsection limits the scope of rights preserved to active participating employees. Rather, it covers all participants in the WRS because all participants have been employees at one time or another. For this proposition, we point to Retired Teachers, where this court said: "The parties do not dispute, and we agree, that WRS *annuitants* have a property interest in the WRS. The *annuitants* ' interest finds its genesis both in chapter 40 and in prior decisions of this court." 207 Wis.2d at 18, 558 N.W.2d 83 (emphasis added). We then cited Wis. Stat. § 40.19(1) and quoted from it as authority for these statements.

¶110 Wisconsin Stat. § 40.19(1) requires a balancing of

interests. An employee has certain contractual rights that may not be abrogated by any subsequent legislative act. However, the state retains the right to amend or repeal, by enactment of statutory changes, any part of the entire chapter "and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered *after* the effective date of any amendment or repeal deleting the statutory authorization for the benefit or rights." Wis. Stat. § 40.19(1) (emphasis added). Moreover, the state is not prevented by the first sentence in the subsection from "requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant," as provided in the last sentence. *Id.*

¶111 All participants who have "benefits accrued" are protected by § 40.19(1) from the abrogation of those benefits unless the benefits are replaced by benefits of equal or greater value. Determining what "rights exercised" or "rights" may not be abrogated is less clear. We agree with respondents Lightbourn and Voight, however, that "Section 40.19 provides a limited contractual right that does not extend to every provision of ch. 40 or every procedural or substantive aspect of the WRS--it extends only to 'rights exercised and benefits accrued' which are 'due' for 'service rendered.' " [FN176]

> FN176. Respondents Lightbourn and Voight's brief at 14.

¶112 We would understand a contention that a participating employee had a right to exercise one of several monetary options at retirement if those options had existed during the period when the participating employee was rendering service but were then eliminated before the employee's retirement. Such a claim would be different from a contention that a participant had a right to maintain some operating procedure in the WRS that had existed during a period that the participant was rendering service.

2. Wisconsin Stat. § 40.01

¶113 A second source of participant property interests and

rights is Wis. Stat. § 40.01. This section sets out the nature and purpose of the public employee trust fund:

> 40.01 Creation and purpose. (1) CREATION. A "public employee trust fund" is created to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale, by providing for the orderly and humane departure from service of employees no longer able to perform their duties effectively, by establishing equitable benefit standards throughout public employment, by achieving administrative expense savings and by facilitating transfer of personnel between public employers.
>
> (2) PURPOSE. The public employee trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515(1)(um) or (ut) or 40.04(2), and shall not be used for the purposes of any other benefit plan. Each member of the employee trust funds board shall be a trustee of the fund and the fund shall be administered by the department of employee trust funds. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section.

¶114 Subsection (1) explains the policy objectives of the trust fund. The fund is created, in part, "to aid public employees in

protecting themselves and their beneficiaries against the financial hardships of old age" and death. Subsection (2) declares that the trust fund "is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of insuring the fulfillment at the lowest possible cost of the benefit commitments to participants ... and shall not be used for any other purpose."

¶115 Like the previously discussed section, Wis. Stat. § 40.01(2) reveals a certain internal tension. Subsection (2) states explicitly that the fund shall be managed and otherwise dealt with solely for the purpose of insuring the fulfillment of benefit commitments to participants ... but "at the lowest possible cost." Insuring the fulfillment of benefit commitments "at the lowest possible cost" is different from maximizing benefits irrespective of cost. The subsection requires some balancing of competing interests.

¶116 Wisconsin Stat. § 40.01 provides specific safeguards to participants. First, trust fund money must be used for proper trust purposes. This principle is illustrated in several cases. In Giessel III, the Board resisted paying for a study of retirement systems from retirement fund assets, as required in legislation. The court agreed:

> The question ... is whether the expense for the governor's study commission ... is a proper expense of the retirement system.... The cost of adequately informing the legislature and the governor so that they may intelligently perform their duties is not a proper expense of the teachers' retirement fund.

12 Wis.2d at 10-11, 106 N.W.2d 301.

¶117 In the Retired Teachers case, the court rejected a legislative directive that the annuity reserve reimburse the state's general fund for certain supplemental benefits paid to pre-1974 annuitants. We said:

> Section 40.27(2) governs the distribution of

> investment earnings of the annuity reserve, and it anticipates payments only to annuitants. The section is utterly devoid of any authority for using annuity reserve funds to reimburse a governmental entity for non-trust obligations. We therefore conclude that the Act further violated § 40.27(2) by mandating a reimbursement for interim GPR supplemental benefits, a non-trust obligation.

207 Wis.2d at 23, 558 N.W.2d 83.

¶118 A similar principle was set out in Association of State Prosecutors with respect to payments from the Milwaukee retirement system to the WRS. 199 Wis.2d at 562-63, 544 N.W.2d 888. We said: "[T]he state cannot simply 'reach' into the County Plan to pay for obligations [the state] has incurred." Id. at 563, 544 N.W.2d 888. Transferring funds to the WRS was labeled a non-trust purpose.

¶119 Second, legislative action affecting the WRS must be consistent with the stated objectives of the trust. We recognized in Association of State Prosecutors, 199 Wis.2d at 563, 544 N.W.2d 888, that the legislature retains power to adjust or amend a retirement plan in certain situations, and in Wis. Stat. § 40.19(1), the legislature explicitly reserves the right to make statutory changes. But participants in the WRS are empowered to challenge legislative actions that deviate from trust objectives or cause injury to the trust.

¶120 Third, the ETF Board must deal with the Wisconsin retirement system in the same faithful manner as trustees would administer any trust, that is, they must exercise diligence, prudence, and absolute fidelity in managing trust assets. Sensenbrenner v. Sensenbrenner, 76 Wis.2d 625, 635, 252 N.W.2d 47 1977); Estate of Allis, 191 Wis. 23, 29, 209 N.W. 945, (1926). Act 11 does not undercut the powers and duties of the ETF Board. Rather, it reaffirms the position of the Board. *See* 1999 Wis. Act 11, § 27(3). Wisconsin Stat. § 40.01 gives participants in the system the right to test whether members of the ETF Board have upheld their fiduciary duties. *Cf.* Retired Teachers, 207 Wis.2d at 26-27, 558 N.W.2d 83.

The inability of the ETF Board to challenge the constitutionality of a legislative act affecting the WRS in court does not relieve board members of their duties as trustees.

3. Integrity and Security of Trust Fund

¶121 A third source of property interests and rights relates to "the integrity and security" of retirement funds. This interest is articulated in Association of State Prosecutors, 199 Wis.2d at 563, 544 N.W.2d 888, but is inherent in Wis. Stat. §§ 40.01 and 40.19. Respondents Lightbourn and Voight suggest that a decrease in contributions that would threaten the actuarial soundness of the retirement fund (with no accompanying provision to provide adequate funding at an appropriate future date) and would likely result in nonpayment of or decrease in accrued benefits would violate both §§ 40.01(1) and 40.01(2). [FN177] Wisconsin Stat. § 40.19(1) surely confers upon participants the right to protect their accounts from either abrogation or dissipation.

FN177. Respondents Lightbourn and Voight's brief at 20.

¶122 We now turn to the petitioners' substantive challenges, applying the above-stated principles to petitioners' claims.

C. $4 Billion Distribution

¶123 *WPPA contends that the $4 billion distribution from the TAA violates* Wis. Stat. § 40.19(1) *and is an unconstitutional taking of property and an unconstitutional impairment of contract.*

¶124 Act 11 directs that $4 billion be distributed from the TAA to the other reserves and accounts in the fixed trust *after* the 1999 annual distribution of 20 percent. This directive is embodied in Section 27, a nonstatutory section of the Act. [FN178]

FN178. 1999 Wis. Act 11, § 27 reads in part:

(1) TRANSFER OF FUNDS FROM THE TRANSACTION AMORTIZATION ACCOUNT OF THE FIXED RETIREMENT INVESTMENT TRUST.

(a) On December 31, 1999, after the annual distribution required under section 40.04(3)(a) of the statutes for the 1999 calendar year is made, $4,000,000,000 shall be distributed from the transaction amortization account of the fixed retirement investment trust to the reserves and accounts of the fixed retirement investment trust in an amount equal to a percentage of the total distribution determined by dividing each reserve's and account's balance on the prior January 1 by the total balance of the fixed retirement investment trust on the prior January 1.

¶125 Most of the $4 billion distribution is sent into the employee, employer, and annuity reserves to fund present or future retirement benefits for participants in the WRS. The $4 billion distribution follows in lock step the earlier 20 percent distribution.

¶126 WPPA's claims that the $4 billion distribution is unlawful should be put in historical context. Prior to 1975, all gains and losses of the fixed retirement investment trust were fully distributed in the year the gain or loss was realized. The immediate recognition of gains and losses led to fluctuations or potential fluctuations in contribution and benefit rates from year to year. In 1973, the legislature created the TAA, to be effective in 1975, as an accounting mechanism to hold the investment gains and losses of the fixed trust, and it regulated the recognition of those gains or losses over time as a means of bringing stability to the system. In its early years, the TAA recorded paper deficits. Nonetheless, from 1975 through 1988, the law provided for an annual TAA distribution of 7 percent. From 1989 to the present, the statutes have provided for an annual TAA distribution of 20 percent. In 1989, the legislature changed the law to increase the percentage of distribution from 7 percent to 20 percent--and it did so without challenge. [FN179]

FN179. 1989 Wis. Act 13; Stipulation of Facts at ¶21.

¶127 In 1987, the legislature authorized a one-time distribution of $230 million from the TAA. In 1989, the legislature authorized a one-time distribution of $500 million from the TAA. In each case, the distribution moved money proportionately to other accounts within the fixed trust, such as the employee, employer, and annuity reserves; and these one-time recognitions were not seriously challenged.

¶128 Act 11 eliminates the TAA over a five-year period and creates, in its place, a market recognition account (MRA) that is to be used for distributing the total market value investment return earned by the fixed trust. Beginning on December 31, 2000, the balance of the TAA is to be determined and then 20 percent of the balance established is to be distributed annually to the accounts in the fixed trust. After the entire balance has been distributed, DETF is directed to close the account.

¶129 WPPA asserts that participants in the WRS have a property right to have the investment earnings of the fixed trust distributed in the manner set by the pre-Act 11 statute. They suggest that a statutory change deviating from the established mechanism violates participant property rights under Wis. Stat. § 40.19(1) and is unconstitutional.

¶130 During the last quarter century, as noted above, the TAA has been changed several times. These changes serve as precedent for the $4 billion distribution. The creation of the TAA resulting in curtailed distributions, the changes in the TAA since 1975 resulting in increased distributions, and the pending closure of the TAA all conflict with the proposition that participants in the WRS have a property right in a particular distribution mechanism frozen in time. If we approved WPPA's position, we would be concluding that past special distributions from the TAA were unlawful. If we accepted WPPA's argument, we would be holding that only 20 percent of the TAA could be distributed each year, regardless of investment performance. This position is untenable. Wisconsin Stat. § 40.19(1) specifically recognizes the authority of the legislature to enact statutory changes to Chapter 40, so

long as *accrued* benefits are not abrogated.

¶131 WPPA contends that there has been a taking of property [FN180] because the $4 billion distribution will fund benefit improvements that not all participants will enjoy equally. They point in particular to 51,000 inactive participants who (1) are credited with interest at the assumed rate of 5 percent annually, rather than the effective rate, and (2) are expected to retire and take a WRS annuity instead of electing to take a separation benefit or dying before they reach retirement age. WPPA asserts that these particular inactive employees do not receive credit for past service (as active participating employees do) and do not receive the full benefit of a distribution because the distribution to them is capped at 5 percent. This argument requires a conventional takings analysis.

FN180. WPPA relies on the state and federal constitution for its taking claims:

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 13 of the Wisconsin Constitution provides:

> The property of no person shall be taken for public use without just compensation therefor.

1. Taking of Property

¶132 Our first step in analyzing an alleged taking is to determine whether a property interest exists. Retired Teachers, 207 Wis.2d at 18, 558 N.W.2d 83. There is no dispute that participants have a general property interest in all the money in the TAA. Ass'n of State Prosecutors, 199 Wis.2d at 558-59, 544 N.W.2d 888; Retired Teachers, 207 Wis.2d at 19, 558 N.W.2d 83 (acknowledging Ass'n of State Prosecutors). This broad interest in the TAA as a whole provides participants with standing to protect the whole. It does not, however, afford participants an accrued property interest in every part of the whole. For instance, an annuitant cannot claim earnings from the employee accumulation reserve, and an active participating employee cannot claim earnings from the annuity reserve, even though both kinds of earnings are recorded in the TAA. Nonetheless, participants in the WRS do have a general property interest in the $4 billion transferred from the TAA.

¶133 Our second inquiry in a takings analysis is to determine whether the property has been taken. Retired Teachers, 207 Wis.2d at 20, 558 N.W.2d 83 (citing Zinn v. State, 112 Wis.2d 417, 424, 334 N.W.2d 67 (1983)). To determine whether the property has been taken, we must examine the nature of the distributions and how Act 11 changes the way funds are distributed from the TAA.

¶134 Wisconsin Stat. § 40.04(3)(a) compels a yearly distribution of 20 percent from the TAA to the accounts of the fixed trust:

> (a) All earnings, profits or losses of the fixed retirement investment trust and the net gain or loss of the variable retirement investment trust shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the

> respective trust bears to the total average daily balance of all participating accounts in that trust. For the fixed retirement investment trust the amount to be distributed shall be the then balance of the current income account plus 20% of the then balance of the transaction amortization account.

Wis. Stat. § 40.04(3)(a).

¶135 On December 31, 1999, the TAA was valued at $17.3877 billion before 20 percent of that balance ($3.4775 billion) was distributed to the other accounts and reserves in the fixed trust. [FN181] When WPPA objects that the additional $4 billion distribution will fund benefit improvements that not all participants will enjoy equally, it is making an attack that could be leveled at the 20 percent annual distribution as well.

FN181. Stipulation of Facts at ¶24.

¶136 To illustrate, the 20 percent annual distribution always has the potential of treating some "inactive participants" different from other "inactive participants." [FN182] The 20 percent annual distribution will treat participants unequally whenever the amount of money being distributed is large enough to give effective rate inactive participants a higher payment than 5 percent rate inactive participants.

FN182. As § 42 of the Stipulation of Facts explains:

> There are two categories of "inactive participants" .... In one group are those who first became covered by the WRS ... on or before January 1, 1982 or who first became covered by the WRS after January 1, 1982 but left participating employment before March 9, 1984 (... the "effective rate inactive participants"). The effective rate inactive participants' accounts in the employee reserve are credited each year with interest at the "effective rate" as defined in § 40.02(23). The other group of inactive participants are those who first became covered by the WRS on or after January 1, 1982

and who were still participating employes on March 9, 1984 (... the "5% rate inactive participants"). The 5% rate inactive participants' accounts in the employee reserve are credited each with interest at the rate of 5%. §§ 40.04(4)(a)(2) and 40.02(6).

¶137 An estimated 60,000 inactive WRS participants are credited with interest at the capped rate of 5 percent annually rather than at the effective rate. [FN183] This means that the remaining 44,000 inactive participants are credited with interest at the effective rate. The fact that 60,000 participants may be comparatively disadvantaged in the annual distribution from the TAA and in any other large distribution from the TAA does not make these distributions unconstitutional.

FN183. Wis. Stat. § 40.02(23). The "effective rate" is not statutorily capped. Consequently, it reflects investment earnings more closely than the fixed 5 percent rate.

¶138 There are subcategories within each of the two classes of non- annuitants. Both active participants and inactive participants include persons who are receiving interest from the TAA at the assumed rate of 5 percent. There is no discrimination by class.

¶139 Benefit disparities and disparities in treatment reflect the complexity of the WRS. [FN184] They speak to a condition that is endemic in this large pension system, with many categories and subcategories of participants who have worked for nearly 1,200 different employers at different times in different places for different benefits. Participant interests are not identical. It would be nearly impossible for policymakers to accommodate and satisfy all participant interests at the same time.

FN184. Stipulation of Facts at ¶¶45-48.

¶140 The issue in this taking claim is whether a participant has been deprived of some *accrued* benefit. Here, all active and inactive employees eligible to receive part of the $4 billion distribution, including the estimated 51,000 inactive employees,

received interest in the employee reserve according to a pre-existing statutory formula. They were not deprived of any accrued benefit. Moreover, inactive employees have no right to a formula enhancement for past service simply because active employees received such an enhancement. The formula enhancement for the past service of current employees must be viewed as an encouragement to these employees to remain in public service. That objective does not apply to inactive employees who have left WRS-covered employment. [FN185]

FN185. Providing improvements in the formula multiplier and interest rate or increases in the benefit caps to inactive employees who have left WRS-covered employment would trigger the provisions of Article IV, Section 26 of the Wisconsin Constitution.

¶141 WPPA quotes WRS actuaries to the effect that "[c]hanging the flow of funds from the TAA to the various fixed reserves affects the distribution of WRS benefits among individual participants." [FN186] This statement is true. But it does not establish that the $4 billion distribution "takes" any accrued benefit "due" for service rendered. To block the $4 billion distribution on grounds that not all participants enjoy the distribution equally would paralyze the TAA and prevent the legislature from adjusting the draw from the TAA to reflect successful investment performance.

FN186. Petitioner WPPA's brief at 40.

¶142 The $4 billion distribution is a legitimate recognition of gains in the TAA, properly dispersed to those who are entitled to receive them. The annuity reserve receives its full share of the TAA distribution. The employee reserve receives its full share of the TAA distribution. The employer reserve receives its full share of the TAA distribution. No participant's accrued benefits are abrogated, damaged, or threatened. Most participants will receive substantial benefit improvements.

¶143 We conclude that WPPA has failed to show beyond a reasonable doubt any taking of property because of the $4 billion distribution from the TAA.

2. Impairment of Contract

¶144 WPPA also asserts that the $4 billion distribution in Act 11 constitutes an impairment of contract, in violation of Article I, Section 10 of the United States Constitution and Article I, Section 12 of the Wisconsin Constitution. [FN187] Here again, petitioners must prove beyond a reasonable doubt that Act 11 is an unconstitutional impairment of contract.

> FN187. Article I, Section 10 of the United States Constitution reads:
>
> > No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.
>
> Article I, Section 12 of the Wisconsin Constitution reads:
>
> > No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.

¶145 WPPA argues that participants have a contract for retirement benefits and that the terms of that contract are embodied in Chapter 40 of the statutes. [FN188] Wisconsin Stat. § 40.19(1) provides in part that "[r]ights exercised and benefits accrued to an employee under [Wis. Stat. ch. 40] for service rendered shall be due as a *contractual right* and shall not be abrogated by any subsequent legislative act" (emphasis added).

> FN188. In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.... In addition, statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis.
>
> United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n. 14, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

¶146 The United States Supreme Court has developed a three-step methodology for analyzing impairment-of-contract claims. Chappy v. LIRC, 136 Wis.2d 172, 187, 401 N.W.2d 568 (1987) (citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)). This court usually follows these steps in evaluating such claims.

¶147 "The first step is to inquire whether the challenged statute has 'operated as a substantial impairment of a contractual relationship.' " Id. (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); Energy Reserves Group, 459 U.S. at 411, 103 S.Ct. 697). "Minimal alteration of contractual obligations may end the inquiry at its first stage." Allied Structural Steel, 438 U.S. at 245, 98 S.Ct. 2716. Hence, if we determine that there has been no impairment or only minimal impairment, that is the end of the analysis.

¶148 If the legislation substantially impairs a contractual relationship, "there must exist a significant and legitimate public purpose behind the legislation." Chappy, 136 Wis.2d at 187, 401 N.W.2d 568 (citing Energy Reserves Group, 459 U.S. at 411, 103 S.Ct. 697). If such a purpose exists for the legislation, "the inquiry is whether the challenged legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." Id. at 188, 401 N.W.2d 568 (quoting in part Allied Structural Steel, 438 U.S. at 244, 98 S.Ct. 2716) (quotation

marks and brackets omitted).

¶149 Both the state and federal contracts clauses limit the power of a state to modify its own contracts. United States Trust Co. v. New Jersey, 431 U.S. 1, 17, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). But these clauses are not an absolute bar to subsequent modification of a state's financial obligations. When a state is accused of impairing the obligations of its own contract, courts will scrutinize "the ability of the State to enter into an agreement that limits its power to act in the future." Id. at 23, 97 S.Ct. 1505. If the legislative contract is not invalid *ab initio* under the reserved powers doctrine, id., the question becomes whether the legislature's impairment of the contract is reasonable and necessary to serve an important public purpose. Id. at 25., 97 S.Ct. 1505 In reviewing that question, courts do not give the legislature the same deference they would give it if it were acting on a subject at arm's length. Rather, they factor in the state's self-interest in acting as it did.

¶150 We conclude that WPPA is unable to complete the first step in an impairment analysis, because the $4 billion distribution does not operate as an impairment of any property right or benefit in Chapter 40. It does not impair the contractual relationship between the state and participants.

¶151 According to WPPA, the $4 billion transfer deprives participants of the contractual right to have the gains of the trust fund distributed in a manner consistent with the TAA's primary purpose--smoothing the losses and gains of the fixed trust. WPPA complains that transferring $4 billion from the TAA for the alternative purpose of funding "new benefits" is not lawful *unless all* participants, including inactives, receive "equitable" benefit increases. "The purpose of the TAA [is] not to create a fund to hold investment earnings until the legislature [decides] how to use them," WPPA declares. [FN189] "If the legislature wants to create new benefits for some, but not all, participants, it can do so by funding those benefits with state funds or through increased contributions--not with Fund earnings." [FN190]

FN189. Petitioner WPPA's brief at 45.

FN190. Petitioner WPPA's brief at 44-45.

¶152 This argument misses the point. The TAA is an accounting mechanism, holding the investment gains of the various accounts in the fixed trust. The TAA, like every mechanism and procedure in Chapter 40, is designed to facilitate the primary purpose of the trust set out in Wis. Stat. § 40.01. Reducing annual fluctuations in contribution and benefit rates is a worthy purpose, but this purpose does not supersede the purpose articulated in § 40.01. Funding benefit increases by recognizing gains in the TAA is fully consistent with Wis. Stat. § 40.01.

¶153 Chapter 40 creates a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan. [FN191] The $4 billion distribution funds the increases in benefits for most active participating employees. It increases annuities for 103,000 annuitants. It provides substantial account enhancements for "effective rate inactive participants." Other inactives receive precisely what the pre-Act 11 statute requires. No accrued benefits are put in jeopardy.

FN191. Stipulation of Facts at ¶7.

¶154 WPPA tries to suggest otherwise. It contends that "the WRS's ability to meet its obligations [is] likely to be jeopardized where Trust Fund earnings are used for a purpose other than what is intended under Wis. Stat. Chap. 40," referring to the smoothing mechanism of the TAA. [FN192] This contention is not supported in the record. WPPA stipulated that Act 11 will not put the trust fund in financial trouble. [FN193]

FN192. Petitioner WPPA's brief at 42.

FN193. Stipulation of Facts at ¶54.

¶155 We have said that legislation that alters the "contractual expectations of the parties impairs the obligation of contract." State ex rel. Cannon v. Moran, 111 Wis.2d 544, 555, 331

N.W.2d 369 (1983) (citing Allied Structural Steel, 438 U.S. at 245-46, 98 S.Ct. 2716).

¶156 In Cannon, the legislature reduced the salaries of certain Milwaukee County circuit judges by the amount of pension benefits they received from the Milwaukee County Employees' Retirement System. Although the legislation did not take the judges' pension benefits per se, it nullified them by depriving them of their full judicial salary. We struck down the legislation as an impairment of contract. Cannon, 111 Wis.2d at 563, 331 N.W.2d
369. The legislature had authorized the judges to terminate irrevocably their membership in the Milwaukee retirement system in order to join the state system, then "pulled the rug out" from under them by passing a law that reduced their salaries. Id. at 559, 331 N.W.2d 369. The legislation was "completely unexpected" and thus altered the judges' contractual expectations. Id.

¶157 In Retired Teachers, the legislature authorized a special investment performance dividend as part of a $230 million distribution from the TAA. Only 25 percent of annuitants received the dividend. The court analyzed the SIPD as a "taking" from the 75 percent of annuitants who received no dividends, not as an impairment of contract. Retired Teachers, 207 Wis.2d at 17, 558 N.W.2d 83. Nevertheless, it would be hard to deny that the SIPD had altered the "contractual expectations" of the 75 percent who received nothing. Id. at 19-20, 23-24, 558 N.W.2d 83.

¶158 These cases offer a sharp contrast to the facts here. Chapter 40 provides no basis for the 5 percent rate inactive participants to expect dividends of more than 5 percent from the TAA. It provides no basis for participants to expect that all benefit caps will be raised if any benefit caps are raised. It provides no basis for participants to expect that periodic benefit improvements will satisfy all participants equally.

¶159 Participants do expect that benefits will be improved when investment gains justify and permit increases. They do understand that the legislature has reserved the right to amend

or repeal "all or any part of this chapter at any time" so long as the legislature does not abrogate "benefits accrued to an employee ... for service rendered." Wis. Stat. § 40.19(1). They understand that amending the statutes is the only way the formula multiplier can be improved or the TAA distributions can be increased, and they likely consider such legislation as having a significant and legitimate public purpose. The $4 billion distribution does not constitute an impairment of contract.

¶160 We conclude that the $4 billion distribution is consistent with the purpose of Chapter 40, the provisions of Wis. Stat. § 40.19(1), and the integrity and solvency of the trust fund. The parties have stipulated that the trust fund is not financially troubled and the $4 billion distribution will not make it so. [FN194] We conclude that the $4 billion distribution does not constitute a taking of property or an impairment of contract and is not unconstitutional beyond a reasonable doubt.

FN194. Stipulation of Facts at ¶54.

D. $200 Million Credit

¶161 *WPPA and SEA contend that the $200 million portion of the total funds distributed to the employer reserve and earmarked as a credit for employers against unfunded liability violates* Wis. Stat. § 40.19(1) *and is an unconstitutional taking of property and an unconstitutional impairment of contract.*

¶162 The $4 billion distribution from the TAA will send an estimated $1.064 billion into the employee reserve, $1.236 billion into the employer reserve, and $1.608 billion into the annuity reserve. [FN195]

FN195. Joint Survey Committee on Retirement Systems, *Wisconsin Retirement System Actuarial Valuations of Benefit and Financing Provisions* 8 (Nov.1999).

¶163 Section 27(1)(b) of Act 11 [FN196] directs that $200 million of the estimated $1.236 billion sent to the employer

reserve be used as employer contribution credits. These credits will serve in lieu of payments for employers that have unfunded liability under the WRS. Employers that do not have unfunded liability will receive credits for payments of employer required contributions. The employer contribution credits will permit each employer to suspend actual cash payments to the employer reserve until the individual employer's share of the credits has been exhausted. [FN197]

FN196. 1999 Wis. Act 11, § 27(1)(b)1 provides:

> The employee trust funds board shall determine each participating employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a) and shall establish for each employer a credit balance in the employer accumulation reserve that equals the employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a), based on each employer's share of covered payroll in 1998. The total amount that shall be reserved for credit balances under this subdivision shall be $200,000,000. In lieu of requiring that an employer make required employer contributions under section 40.05(2)(b) of the statutes, the employee trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05(2)(b) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). For any employer that is not required to make contributions under section 40.05(2)(b) of the statutes, the employee trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05(2)(a) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). The

employee trust funds board shall make such deductions until the credit balance is exhausted, at which time the employer shall resume making all required employer contributions.

FN197. Currently, contribution rates for the payment of unfunded prior service liability are amortized over 40 years and the unfunded prior service liability balance may not be adjusted to reflect any change in the actuarial assumptions that are used to evaluate the liabilities of the WRS. Stipulation of Facts at ¶¶ 32-34. Consequently, the unfunded prior service liability balance may exceed or be less than the amount that is actuarially required to fund the prior service incurred by employers under the WRS. *Id.* at ¶32.

¶164 WPPA and SEA contend that section 27(1)(b) is unconstitutional as an unlawful taking and an impairment of contract. They also argue that it violates Wis. Stat. § 40.19(1) and trust principles. On the facts presented, we disagree.

¶165 The sole purpose of the employer reserve is to ensure the fulfillment of benefit commitments to participants at the lowest possible cost. Put differently, the sole purpose of the employer reserve is to fund the future payment of accrued benefits through a reasonable and prudent contribution system.

¶166 To achieve this objective, each year every employer is required to make contributions sufficient to fund the net costs of the current discounted value of future retirement benefits likely to be paid for employees' service rendered in the current year. [FN198] Each employer also is required to make steady contributions to erase any unfunded liability thatthe employer has for employees' prior service. [FN199]

FN198. Wis. Stat. § 40.05(2)(a); *Wisconsin Retirement System, supra,* at 38.

FN199. Wis. Stat. § 40.05(2)(b) and (bm).

¶167 These employer required contributions are credited to

the employer reserve. [FN200] Benefit adjustment contributions are treated as employer contributions, and they too are credited to the employer reserve, even though they are classified as employee contributions. In addition, Wis. Stat. § 40.04(5) provides that the employer reserve shall be:

FN200. Wis. Stat. § 40.04(5)(a).

> (b) Credited, as of each December 31, all fixed annuity division interest not credited to other accounts and reserves under this section.
>
> ...
>
> (d) Credited as of the date of termination of any annuity under s. 40.26 or 40.63(9)(c) with the excess of the then present value of the terminated annuity over the aggregate amount of credits reestablished in the accounts of the participant.
>
> (e) Credited all amounts waived, released or forfeited under any provision of this chapter.

¶168 The other source of funds for the employer reserve is earnings. Some of the money in the employer reserve is invested. The gains and losses from these investments are reflected in the TAA.

¶169 When earnings in the TAA are distributed to the various reserves and accounts in the fixed trust, the amount distributed to each account is a close approximation of the earnings derived from that account. There may not be a perfect correlation between the distribution of earnings in the TAA and the original source of investment funds because of the dynamic, ever-changing nature of each reserve; but the correlation is close. For the most part, the employer reserve is not receiving earnings on money derived from other accounts.

¶170 To summarize, most of the non-earnings dollars going into the employer reserve come directly from employers; and most of the earnings distributed to the employer reserve are earnings on employer reserve funds. To the extent that *any* non-employer money ends up in the employer reserve, it is directed there by longstanding provisions of Chapter 40 to help

underwrite the ultimate payment of benefits, without impairing the property interests of any participant.

¶171 Some of the money in the employer reserve is not invested. It is held so that it can be paid over to the annuity reserve when active participating employees retire or when inactive employees become eligible to receive a benefit. Whenever an active participating employee retires or an inactive employee becomes eligible to receive a benefit, the provisions of Chapter 40 dictate exactly how much money is transferred out of the employer reserve. [FN201]

FN201. Wis. Stat. § 40.04(6).

¶172 The balance in the employer reserve is not relevant to a participant's accrued retirement benefit. The size of the employer reserve balance does not increase or in any way determine the contractual benefit to be received by participants. [FN202] At best, the balance in the employer reserve may heighten the possibility of an increase in the formula multiplier or the benefit caps in a future vote by the state legislature.

FN202. Respondent WEAC's brief at 54.

¶173 Respondents postulate that the employer reserve functions as a "sum sufficient" to fund accrued benefits. [FN203] WEAC observes that the employer reserve "is tapped to pay whatever amount is necessary, in addition to the individual account balance, to fund the annuity." [FN204] We agree.

FN203. Respondents Lightbourn and Voight's brief at 42, 45, 55; Respondent WEAC's brief at 54.

FN204. Respondent WEAC's brief at 54.

¶174 The estimated unfunded liability in the employer reserve on December 31, 1998, was $2.2 billion. [FN205] Even if employers were to completely pay off every penny of this liability, they would still be responsible for future unfunded liability resulting from (1) future benefit increases voted by the

legislature, (2) new recognitions of past service, and (3) actuarially-based recalculations of liability by the ETF Board. [FN206] Even if employers were to pay off every penny of this liability, they would not be assuring increased employee benefits.

FN205. Stipulation of Facts at ¶¶32, 58.

FN206. *See* 1999 Wis. Act 11, § 27; Stipulation of Facts at ¶33.

¶175 No one in this litigation suggests that Act 11 abrogates the statutory and constitutional obligation of employers to fulfill benefit commitments to participants. These "benefits accrued" for "service rendered" are the essence of the property right enjoyed by participants. There is no taking of property or impairment of contract when everyone concedes that accrued benefits must be paid.

¶176 Nothing in Act 11 permits employers to back away from their obligation to pay accrued benefits. What SEA and WPPA claim instead is that participants in the WRS have a property right in the employer reserve and a contract right in a particular regimen of employer funding that entitles them to block legislation that affects the amount of employee required contributions, or timing of employer required contributions, even though they do not allege that Act 11 threatens the security of the trust fund. Alternatively, petitioners claim that it is unconstitutional for the legislature to provide 1,200 government employers (and the taxpayers who support them) respite from employer required contributions--even though the money is not needed now, may not be needed in the future, and absolutely will have to be paid if ever it is needed--because, they claim, contribution relief for employers is a non-trust purpose.

¶177 In making these arguments, WPPA and SEA shift the discussion from the fulfillment of accrued benefits--the participant property interest--to the relative security of accrued benefits. They also claim a right to maximize the chance for additional benefits in the future.

¶178 SEA reasons that the trust fund "is more secure with cash reserves than it is when such reserves are replaced with a promise of repayment." [FN207] This may be true. The fact is, however, Chapter 40 explicitly recognizes "unfunded prior service liability." Wis. Stat. § 40.05(2)(b). It authorizes the gradual liquidation of that liability over a 40-year period. *Id.* It allows advance payment of the liability, permitting employers to avoid annual interest on their debt, Wis. Stat. § 40.05(2)(b) and (bg), but it does not require advance payment. Chapter 40 creates absolute liability for accrued benefits. It does not demand absolute security for that liability. There is no property right in absolute security because that would require cash in advance.

FN207. Petitioner SEA's brief at 37.

¶179 Chapter 40 does not give active participating employees a property right to determine exactly how employers fulfill their benefit commitments. It gives them a property right in having their benefit commitments fulfilled. Participants do not have a legal right to veto legislative decisions about benefit funding without showing some tangible injury. In this, petitioners have failed.

¶180 Petitioners argue that there could be a shortfall in the employer reserve at some point in the future. Such a shortfall is more likely, they say, because $200 million will not be contributed to the reserve as a result of the contribution credits. They note that if a shortfall were to occur and it required an increase in contribution rates, the rate increase would be apportioned equally between employer required contributions and benefit adjustment contributions ostensibly paid by employees. Even if employers were to pick up all employee contributions associated with such a rate increase, they argue, the additional employer burden would leave less money for employee wage increases.

¶181 The court is not faced with these facts. We note that a temporary respite in employer contributions may make additional money available in the short term for employee wage increases. For some employees, such increases could affect

"final average earnings." Should employees as a class ever have to make contributions to the employer reserve, they may renew the argument that the balance in the fund would have been greater if there had been no employer credits.

¶182 Finally, petitioners argue that they are entitled to all money in the employer reserve. WPPA asserts that when the legislature authorized the $200 million in employer credits, it took money "owned by the participants and put [it] into the pockets of employers." [FN208] "[T]he $200,000,000 transfer from the TAA is tantamount to theft." [FN209] "After Act 11's compelled gift [to employers], $200,000,000 is gone from the Trust Fund. It is no longer available to beneficiaries of the trust." [FN210] "There is no legitimate trust purpose being served by the employer credit account." [FN211]

FN208. Petitioner WPPA's brief at 15.

FN209. Petitioner WPPA's brief at 16.

FN210. Petitioner WPPA's brief at 24.

FN211. Petitioner SEA's brief at 28.

¶183 In fact, no money is removed from the employer reserve. The $200 million credit reduces the amount of unfunded liability in the employer reserve without requiring employers to make equivalent cash contributions, but this is different from removing money from the reserve for a non-trust purpose. Money cannot be removed from the employer reserve for a non-trust purpose.

¶184 Every distribution from the TAA to the employer reserve has the potential to affect employer required contribution rates. When the balance in the employer reserve is large, the chances are good that the ETF Board will respond by reducing employer required contributions under Wis. Stat. § 40.05(2)(a). In the past, because of good investment performance and other factors, the ETF Board has reduced employer required contributions on several occasions. These rate adjustments have influenced the balance in the employer

reserve.

¶185 The $200 million employer credit is a new departure because it will reduce employer required contributions under § 40.05(2)(b) instead of § 40.05(2)(a), although it will reduce contributions under § 40.05(2)(a) for employers who have no unfunded liability.

¶186 We see no legal reason why slowing the stream of funds into the employer reserve under § 40.05(2)(a) does not violate the participants' property interests but temporarily suspending the flow of funds into the employer reserve under § 40.05(2)(b) does. The former action assists employers with liabilities for current service while the latter action assists employers with liabilities for past service. Neither action relieves employers of their absolute obligation to fulfill all benefit commitments as they come due. Both actions hold down costs. The legitimacy of this objective is specifically acknowledged in Wis. Stat. § 40.01(2) ("fulfillment at the lowest possible cost"). This objective is reaffirmed in Wis. Stat. § 40.04(5)(e), which credits the employer reserve with "all amounts waived, released or forfeited under any provision of this chapter" to help employers fulfill benefit commitments.

¶187 In maintaining that employees are entitled to all money in the employer reserve, WPPA and SEA are really claiming a contractual right to benefit increases that might be, but have not yet been, approved. They reason that the greater the balance in the employer reserve, the more likely it is that the legislature will vote to increase retirement benefits, inasmuch as the legislature will be able to fund most or all of the increases out of the earnings of the fixed trust.

¶188 This court cannot invalidate a legislative act on grounds that it may reduce the possibilities for an increase in retirement benefits sometime in the future. Our responsibility is to uphold legislation whenever we reasonably can. These speculative claims do not provide a basis for finding Act 11 unconstitutional beyond a reasonable doubt.

1. Taking of Property

¶189 Both WPPA and SEA view the $200 million credit as a taking. This requires us to determine, first, whether a property interest exists, and, second, whether the property has been taken.

¶190 Non-annuitant participants in the WRS have a general property interest in the employer reserve because it is one of the funding sources for their future benefits. Once contributions enter the employer reserve, they no longer belong to employers and may not be reclaimed by employers. They are assigned to participants. Non-annuitant participants have the right to block improper diversions from the employer reserve and to protect the integrity and security of the employer reserve so that benefit commitments will be fulfilled. Non-annuitants have an individual property interest to the full extent of their benefit commitments.

¶191 Conversely, participants do not have a right to require a balance in the employer reserve that is greater than an amount prudently necessary to fulfill statutorily-determined benefit commitments over an actuarially-determined period of time. The ETF Board has long had the authority to set contribution rates to achieve this objective. Wis. Stat. § 40.03(1)(e). The legislature buttresses this authority in Act 11: "the employee trust funds board shall retain authority to maintain proper actuarial funding of the Wisconsin retirement system." 1999 Wis. Act 11, § 27(3). This affirmation of the ETF Board's authority represents a fail-safe for the WRS that overrides all other provisions of Act 11.

¶192 While the $200 million employer credit is likely to affect the balance in the employer reserve, we see no evidence that the credit here will damage the property interests of non-annuitant participants. It does not "take" their property. All money in the employer reserve remains in the reserve and will go toward funding future benefits. No non-annuitant participant will receive less from the employer reserve than Chapter 40 requires. Speculation about how benefits might be increased in the future does not outweigh the legislature's right to amend the provisions of Chapter 40 to reduce employer costs on a temporary basis, provided the WRS remains secure.

2. Impairment of Contract

¶193 WPPA and SEA also contend that the $200 million credit constitutes an impairment of contract. This claim fails because petitioners cannot show an impairment of the contractual relationship. Chappy, 136 Wis.2d at 187, 401 N.W.2d 568.

¶194 WPPA suggests that the employer credit here is analogous to the transfer of funds from one retirement fund to another. The credit, it argues, "permanently reduces the dollars available to participants from the Fund." [FN212] It quotes Association of State Prosecutors to the effect that: "Any pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible...." [FN213]

FN212. Petitioner WPPA's brief at 28.

FN213. Petitioner WPPA's brief at 29 (quoting Ass'n of State Prosecutors, 199 Wis.2d at 560, 544 N.W.2d 888).

¶195 That argument overlooks the distinction between taking money out of a fund held in trust for participants, and suspending payment of money into a fund before the employers' property interest has transferred. Moreover, in Association of State Prosecutors, the money leaving the Milwaukee County fund was *never* going to be replaced by the WRS. Here the money not sent into the employer reserve *must* be replaced if it is ever needed.

¶196 Petitioners' contract claim also skirts the fact that Chapter 40 preserves the state's right "to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time ... and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal." Wis. Stat. § 40.19(1). This language is just as much a part of the contract as any other provision in Chapter 40. When the legislature acts to amend the chapter to hold down employer costs, it is acting

in conformity with Wis. Stat. § 40.01(2), so long as it is not attempting to abrogate benefit commitments or compromise the security of the fund.

¶197 SEA admits that the provisions of Act 11, in and of themselves, do not leave the trust fund in a financially troubled condition. It suggests instead that Act 11 poses a "systematic threat to the Trust Fund" that will serve as a dangerous precedent "for future legislative conversions that could threaten the solvency and actuarial soundness of the Trust Fund." [FN214]

FN214. Petitioner SEA's brief at 42.

¶198 During oral argument, the court explored the question whether the legislature could recognize sufficient money from the TAA to wipe out all unfunded liability in the employer reserve. This hypothetical would present a very different set of facts and circumstances from the present case. We think the checks and balances within the legislative process, bolstered by the requirements of Article IV, Section 26, and Joint Rule 12, make it unlikely such a scenario will develop. Moreover, the ETF Board would stand as a bulwark of fiduciary responsibility to protect the security of the fund. Critics of such a move would focus on the cumulative effect of liability reductions in relation to other legitimate objectives of the employer reserve and suggest an impermissible loss of balance. In any event, the specter of an extreme situation is no substitute for the facts at hand.

¶199 We conclude that the $200 million employer contribution credit is not an unconstitutional taking or an impairment of contract. It does not conflict with Wis. Stat. § 40.19(1) or trust principles. The $200 million credit is not unconstitutional beyond a reasonable doubt.

E. Amendments Changing the Assumed Rate and the Across-the-Board Salary Increase Rate

¶200 WPPA and SEA contend that the legislative modifications to the statutory assumed rate and the statutory

across-the-board salary increase rate usurp the ETF Board's authority, thereby impairing their contract rights under Wis. Stat. § 40.19(1), *and that the rate changes are otherwise unconstitutional.*

¶201 Employer required contribution rates are not set by statute. They are set by the ETF Board upon recommendation of the actuary as part of an annual actuarial evaluation of the WRS. [FN215] Each year the WRS consulting actuary evaluates the funding requirements of the system, then makes recommendations of the contributions necessary to pay the costs of future retirement benefits. [FN216]

FN215. Stipulation of Facts at ¶28.

FN216. Stipulation of Facts at ¶28.

¶202 As noted above, the actuary incorporates two key actuarial assumptions into the recommendations for employer required contributions. One is the "assumed rate," defined as "the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis." Wis. Stat. § 40.02(7). Another is the across-the-board salary increase rate. *Id.*

¶203 Prior to Act 11, Wis. Stat. § 40.02(7) read as follows:

> "Assumed rate" means the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis. The assumed rate shall be a rate of 7.5% and the actuarial assumption for across-the-board salary increases for the purpose of valuing the liabilities of the Wisconsin retirement system shall be 1.9% less than the assumed rate unless due to changed economic circumstances the actuary recommends and the board approves a different rate. The assumed rate for a calendar year shall be used for all calculations of required contributions and reserves for participants, except as provided in s. 40.04(4)(a)2. and 2m., and the amount of any

lump sum benefit paid instead of an annuity, except it shall not be used for any purpose for which the assumed benefit rate is to be used under sub. (6).

¶204 Act 11 amended Wis. Stat. § 40.02(7), changing the assumed rate in the statute from 7.5 percent to 8 percent. [FN217] It also changed the across-the-board salary increase rate from 1.9 percent less than the statutory assumed rate to 3.4 percent less than the statutory assumed rate. [FN218]

FN217. 1999 Wis. Act 11, § 4.

FN218. 1999 Wis. Act 11, § 4.

¶205 The impact of these statutory changes is somewhat illusory. The ETF Board exercised its authority to revise the assumed rate twice, including 1992 (when it set the rate at 8 percent for 1993). The Board exercised its authority to revise the across-the-board salary increase rate in 1988, 1994, and 1997 (when the rate was set at 4.8 percent, that is, 8 percent less 3.2 percent). Hence, the real effect of Act 11 is to change the across-the-board salary increase rate from 4.8 percent to 4.6 percent.

¶206 Act 11 maintains the authority of the Board to alter the actuarial rates "due to changed economic circumstances" when the actuary recommends different rates. Wis. Stat. § 40.02(7); 1999 Wis. Act 11, § 4. It also vests the ETF Board with clear "authority to maintain proper actuarial funding of the Wisconsin retirement system ." 1999 Wis. Act 11, § 27(3).

¶207 WPPA and SEA challenge the legality of the changed statutory assumptions. They argue that the changes usurp the exclusive authority of the ETF Board to set these two actuarial rates. According to WPPA, "the legislature unilaterally imposes a new 'assumed rate' on WRS participants. This interferes with the statutory and fiduciary responsibility of the DETF and the Board." [FN219] The rate changes, SEA declares, "were not recommended by the actuary, were not based on changed economic circumstances, and were not

approved by the ETF Board." [FN220]

FN219. Petitioner WPPA's brief at 30-31. The assumed rate is also the rate of interest on unfunded liability. Wis. Stat. § 40.05(2)(b).

FN220. Petitioner SEA's brief at 44.

¶208 This argument would be compelling if the legislature had stripped the ETF Board of its broad discretion to change the rates, irrespective of the statute. It did just the opposite. Hence, the ETF Board may change actuarial rates in response to changed economic conditions upon recommendation of the actuary, or if necessary to maintain proper actuarial funding of the system.

¶209 The changes in the assumed rate and the across-the-board salary increase rate do not violate Wis. Stat. § 40.19(1). WPPA insists that "one of the contract rights of the participants in the WRS is that it be insulated from politics, and that the Board acting as fiduciary, not the legislature acting like politicians, be in charge of the day-to-day decision-making." [FN221]

FN221. Petitioner WPPA's brief at 36.

¶210 WPPA ignores the fact that benefit increases must be approved by the legislature, acting in a policy-making capacity. Wisconsin Stat. § 40.19(1) gives that same legislature the right to change the terms of the WRS contract, so long as modifications do not abrogate benefits accrued to participants for service rendered.

¶211 In the past, the ETF Board has repeatedly adjusted employer required contributions and unfunded liability after making adjustments in the assumed rate and the across-the-board salary increase rate. We do not understand why the legislature may not also make adjustments in statutory rates, provided the ETF Board has the final word so that the WRS is always protected.

¶212 No point would be served by further analysis of the contention that the changes to the actuarial assumptions are a taking of property and an impairment of contract, as these contentions have already been discussed twice. The same reasoning applied in our constitutional discussion of the$4 billion transfer and the $200 million credit applies here. Nothing the legislature has done relieves employers of their absolute liability to fulfill the benefit commitments contemplated in Wis. Stat. § 40.19(1). These accrued benefits are the essence of the participants' property interest. There is no taking of that interest. Participants do not have a property interest in a particular actuarial assumption set in the statute. They have an interest in the integrity and security of the trust fund, and this legislation does not put that in jeopardy.

F. Benefit Caps

¶213 *WPPA contends that raising the 65 percent benefit cap by 5 percent for all employees except protective occupation employees violates the equal protection clause of the United States Constitution and* Article I, Section 1 *of the Wisconsin Constitution.*

¶214 Active participating employees who retire when they are entitled to receive a benefit and inactive participating employees who become eligible to receive a benefit may choose between a "normal form annuity" (the formula benefit) or the money purchase annuity provided in Wis. Stat. § 40.23(3). The money purchase annuity is based upon "the sum of the participant's accumulated additional and required contributions plus an amount from the employer accumulation reserve equal to the participant's accumulated required contributions." Wis. Stat. § 40.23(3).

¶215 A normal form annuity or formula benefit is capped. A money purchase annuity is not.

¶216 Prior to Act 11, the *maximum* amount of the initial annuity for a participant in the WRS (including a protective occupation participant with social security) who receives a formula benefit, was an amount equal to 65 percent of the

participant's final average earnings. Wis. Stat. § 40.23(2m)(b). The notable exception to the 65 percent cap was for protectives without social security whose formula benefit was capped at 85 percent of final average earnings.

¶217 Act 11 raises the benefit cap for all active participating employees who are capped at 65 percent *except* protectives with social security. The formula benefit for these protectives remains capped at 65 percent, while the formula benefit for the remaining protectives remains capped at 85 percent.

¶218 WPPA contends that the failure to raise the benefit cap for the "65 percent" protective occupation participants denies them equal protection of the law, in violation of the federal and state constitutions. [FN222] We are not persuaded.

> FN222. The Fourteenth Amendment to the United States Constitution reads, in part:
>
> > No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.
>
> Article I, Section 1 of the Wisconsin Constitution provides:
>
> > All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

¶219 WPPA asserts that there is no rationale in the legislative history of Act 11 explaining why the Act increased the cap for general, executive, and elective participants to 70 percent of final average earnings but maintained the 65 percent cap for law enforcement participants. [FN223] "There is no rational basis for denying protective occupation participants with social

security the increase in the cap," WPPA declares. [FN224]

FN223. Petitioner WPPA's brief at 53.

FN224. Petitioner WPPA's brief at 54.

¶220 The practical effect of the law is that protectives with social security are capped with a formula benefit when they have 32.5 years or more of creditable service. The law caps the formula benefit of the other protectives when they have 34 years or more of creditable service. [FN225] There are currently 12 protectives with social security and 29 protectives without social security who have at least 32.5 years and 34 years of creditable service, respectively, who will not be eligible to receive an increase in their formula- based annuity when Act 11 is implemented. [FN226] However, according to DETF, because the trust fund's assets have enjoyed good investment performance in recent years, each of the 41 protectives, "if they retired in the foreseeable future, will receive a money purchase annuity, rather than a formula-based annuity. The benefits of a money purchase-based annuity are not subject to the maximum annuity limitations." [FN227]

FN225. Stipulation of Facts at ¶62.

FN226. Stipulation of Facts at ¶64.

FN227. Stipulation of Facts at ¶64.

¶221 When a party seeks to challenge the constitutionality of a statute on equal protection grounds, it must demonstrate that the statute treats members of a similarly situated class differently. Tomczak v. Bailey, 218 Wis.2d 245, 261, 578 N.W.2d 166 (1998) (citing State v. Post, 197 Wis.2d 279, 318, 541 N.W.2d 115 (1995)). Usually, this court will uphold a statute under an equal protection challenge if we find that a rational basis supports the legislative classification. Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, ¶56, 237 Wis.2d 99, 613 N.W.2d 849. A statute not subject to strict scrutiny analysis, as is conceded by WPPA here, enjoys a strong presumption of constitutionality; and we employ a rational

basis test to examine Act 11's constitutionality.

¶222 Under a rational basis test, a statute is unconstitutional if the legislature applied an irrational or arbitrary classification when it enacted the statute. Omernik v. State, 64 Wis.2d 6, 18-19, 218 N.W.2d 734 (1974). But the court must sustain a statute using this analysis unless we find that it is patently arbitrary and bears no relationship to a legitimate government interest. Tomczak, 218 Wis.2d at 264, 578 N.W.2d 166. As we said in Aicher: "Recognizing that classifications often are imperfect and can produce inequities, our goal is to determine whether a classification scheme rationally advances a legislative objective.... In so doing, we are obligated to locate or ... construct a rationale that might have influenced the legislative determination." Aicher, 237 Wis.2d at § 57, 613 N.W.2d 849 at ¶57.

¶223 A legislative classification satisfies the rational basis test if it meets five criteria:

> (1) All classification[s] must be based upon substantial distinctions which make one class really different from another.
>
> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only. [... It must not be so constituted as to preclude addition to the numbers included within a class.]
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Tomczak, 218 Wis.2d at 272-73, 578 N.W.2d 166 (quoting Dane County v. McManus, 55 Wis.2d 413, 423, 198 N.W.2d 667 (1972)). Act 11 meets these criteria.

¶224 The legislature has differentiated between protective occupation participants and other WRS participants in several respects. Traditionally, protectives have been given higher formula multipliers than most other WRS participants, especially the protectives without social security. The normal retirement age of protectives is 54, or 53 with 25 years of service, whereas the normal retirement age of general employees is 65, or 57 with 30 years of service. [FN228] The minimum retirement age (for early retirement with reduced benefits) is 50 for protectives, but 55 for all other categories. [FN229]

FN228. Wis. Stat. § 40.02(42); Stipulation of Facts at ¶47.

FN229. Wis. Stat. § 40.23(1)(a); Stipulation of Facts at ¶48.

¶225 Because of the costs associated with these benefits, the total contribution rates for protectives are higher than for other categories of employees--16.6 percent for protectives with social security, 23.4 percent for protectives without social security. [FN230]

FN230. Stipulation of Facts at ¶49.

¶226 Plainly, protectives are among the most expensive employees to maintain. Thus, there are not only policy reasons (related to the demanding nature of the work) but also economic reasons (related to cost) for the legislature to encourage protective occupation participants to retire at the normal retirement age. Protectives with social security will not become capped under the law until 7.5 years *after* the normal retirement age if they have 25 years of service. Protectives without social security will not become capped under the law until 9 years after the normal retirement age if they have 25 years of service.

¶227 We believe this analysis provides a rational basis for the classifications drawn by the legislature. The classifications are long standing and germane to the law. Moreover, the legislature did not discriminate against protectives when it increased the formula multiplier. It increased the multiplier for past service for all protectives who were active participating employees on January 1, 2000. Because of the money purchase annuity, WPPA is unable to point to a single protective that will be hurt by continuation of the benefit caps if the protective retires at any time in the foreseeable future. WPPA has provided no credible basis to invalidate the law on equal protection grounds. They have failed to show that this component of the statute is unconstitutional beyond a reasonable doubt.

G. Sufficient State Funds

¶228 *SEA contends that Act 11 is unconstitutional because it fails to provide sufficient state funds to cover the cost of increased benefits as required by* Article IV, Section 26 of the Wisconsin Constitution. [FN231]

FN231. Petitioner SEA's brief at 47.

¶229 SEA observes that the benefit improvements in Act 11 are funded, at least in part, with assets of the trust fund. Assets of the trust fund, it argues, cannot be considered "state funds." Therefore, the Act does not comply with the constitution.

¶230 Earlier in this opinion, we carefully avoided a determination whether Article IV, Section 26 applies to Act 11. We held instead that if the three-fourths vote provision of Section 26 did apply, the Act had been passed by "a three-fourths vote of all the members elected to both houses of the legislature."

¶231 One effect of the 1974 constitutional amendment is to authorize "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system." The two prerequisites for increased benefits using the authority *under the amendment,* are (1) "a three-fourths vote" and (2)

"sufficient state funds to cover the costs of the increased benefits."

¶232 Act 11 does not appropriate tax dollars to cover the costs of increased benefits for either state or local employees. Consequently, if we were to determine that Article IV, Section 26 applies to Act 11, we might have to invalidate all benefit enhancements in the Act, or, in the alternative, hold that monies in the trust fund are "state funds." On the other hand, if we were to hold that the provisions of Article IV, Section 26 do not apply to Act 11--an act with multiple benefit enhancements for both past and present employees--we would be holding that Assembly Bill 495 could have been passed by majority vote in each house of the legislature. The latter holding would establish an important precedent for future pension enhancement legislation.

¶233 There may be ways to interpret the constitutional language to avoid these stark and difficult choices. In this case, however, SEA has failed to argue its point with sufficient clarity or conviction that we feel bound to address the question. One and one-half pages of indifferent argument are inadequate to inform the court on an issue of this magnitude. As we noted recently in Wisconsin Conference Board of Trustees of the United Methodist Church v. Culver, 2001 WI 55, ¶38, 243 Wis.2d 394, 627 N.W.2d 469 (quoting Cemetery Services, Inc. v. Department of Regulation & Licensing, 221 Wis.2d 817, 831, 586 N.W.2d 191 (Ct.App.1998)): "[W]e generally choose not to decide issues that are not adequately developed by the parties in their briefs."

¶234 We respectfully suggest that the legislature examine the implications of the "state funds" language in Article IV, Section 26, which was adopted as a floor amendment to 1971 Senate Joint Resolution 3 on February 11, 1971. This legislative action predated by several years the creation of the TAA and it may not have contemplated the dynamic evolution of the WRS.

V. CONCLUSION

¶235 To sum up, this court concludes that Act 11 is

constitutional, having been approved by the requisite number of votes, namely, "a three-fourths vote of all the members elected to both houses of the legislature." The Act does not take the petitioners' property without just compensation, nor does it impair the obligations of their contract with the State of Wisconsin. It does not violate the fundamental principles of Chapter 40 or any right preserved in Wis. Stat. § 40.19(1). It does not violate trust principles. Rather, it strengthens the hand of the ETF Board. Consequently, the relief requested by petitioners is denied and the injunction issued by this court is lifted.

By the Court.-- Rights declared and declaratory relief denied.

BABLITCH, J., concurs and dissents.

SHIRLEY S. ABRAHAMSON, Chief Justice, dissents.

BRADLEY, J., joins dissent.

¶236 WILLIAM A. BABLITCH, J. (concurring in part, dissenting in part). I join the majority opinion with the exception of part IV.D. regarding the $200,000,000 credit given to employers. This credit is a forgiveness of a debt owed by employers to the Wisconsin retirement system (WRS). It is not the state's to forgive. The state is not the owner of this debt; the employees are. Accordingly, I respectfully dissent to this part of the majority opinion. My reasoning follows.

¶237 The thrust of my dissent can be easily illustrated by a hypothetical. "A" owes "B" $200. "C" tells "A," "Don't pay 'B.' I forgive that debt." "B" then says, "Hey, that debt belongs to me. You can't forgive it." "C" then replies, "I just have." "A" is, of course, all of the employers in the Wisconsin Retirement System. "B" is all of the employees. "C" is the legislature. That, in effect, is precisely what happened in this part of the legislation.

¶238 Prior to the legislation, state and municipal employers either owed or will owe $200,000,000 into the WRS. This legislation forgives this past and future debt. Accordingly, the

WRS will have $200,000,000 fewer assets available to it when future employee benefits or contributions are considered.

¶239 This $200,000,000 of debt, past or future, is not the legislature's money to use to balance their budget, relieve property taxes, or the like. The money belongs to the employees.

¶240 Is this an unconstitutional taking? Of course.

¶241 In a takings analysis, we must first determine whether the affected parties have a property interest. Wis. Retired Teachers Ass'n v. Employe Trust Funds Bd., 207 Wis.2d 1, 18, 558 N.W.2d 83 (1997). In this case, the employees unquestionably have a property interest in this debt. The debt is to the system. This money is not largesse from the employers; it is their obligation to pay.

¶242 We have consistently held that employees have a property interest in their retirement system. *See* Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 558, 563, 544 N.W.2d 888 (1996); State Teachers' Ret. Bd. v. Giessel, 12 Wis.2d 5, 910, 106 N.W.2d 301 (1960). Here, the debt (present and future) is in essence an asset of that system which the employees are the beneficiaries.

¶243 Once we determine that a property interest exists, the next step is to examine whether this interest has been taken. Wis. Retired Teachers Ass'n, 207 Wis.2d at 20, 558 N.W.2d 83. Again, it seems clear beyond a reasonable doubt that an asset of the system, the present and future debt of the employers to the system, has been taken because the obligation has been relieved. There is now $200,000,000 less in the system than there would have been. That seems to be a taking under anybody's definition.

¶244 This is woefully bad precedent. To allow the legislature to take assets from the retirement system which belongs to the employees and use it for a purpose other than the employees without so much as a "by your leave," which is of course what happened here, potentially opens the floodgates to great

mischief. We have previously warned of the dangerousness of such precedent. Association of State Prosecutors, 199 Wis.2d at 562, 544 N.W.2d 888.

¶245 What if the legislature needs to plug a $25,000,000 hole in the state budget? What is to stop the legislature from "forgiving" the state $25,000,000 in future payments into the employer reserve account?

¶246 What if the counties, in their demand for property tax relief, are willing to cut a deal with the legislature for forgiveness of whatever amount, both past and future debt, in lieu of state aids?

¶247 No amount of words can paper over the end result here. The employers are $200,000,000 richer because they no longer have a $200,000,000 obligation; the employees are $200,000,000 poorer because they no longer have available to them, either now or in the future, that money for potential benefits. I respectfully dissent.

¶248 I would sever that portion of the legislation regarding the $200,000,000 credit and leave the rest of the legislation intact.

¶249 SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE (dissenting). It is the province of this court to decide the constitutionality of legislation, not the wisdom of the legislature. I conclude that Act 11 is an unconstitutional intrusion on the state pension fund. [FN1]

> FN1. This original action to declare Act 11 unconstitutional was initiated by the Employe Trust Fund Board and Eric O. Stanchfield, Secretary of the Employe Trust Fund. This court denied the Board's and the Secretary's petition for leave to commence the action on the ground that they lack standing to challenge the constitutionality of the legislation. *See* Supreme Court Order filed February 10, 2000; *see also* Fulton Found. v. Dep't. of Taxation, 13 Wis.2d 1, 11, 108 N.W.2d 312 (1961); Columbia County v. Bd. of Trustees of the Wis.

Ret. Fund, 17 Wis.2d 310, 31617, 116 N.W.2d 142 (1962); State v. City of Oak Creek, 2000 WI 9, 232 Wis.2d 612, 605 N.W.2d 526. While I dissented in City of Oak Creek and continue to disagree with the decision, I am bound by it and therefore concurred in the order dismissing these parties.

¶250 The challenge to Act 11 is multifaceted. Unlike the majority opinion, a dissent need not resolve the constitutionality of each provision. I shall touch upon only two of the challenges, but my silence about the others should not be interpreted as agreement with the majority opinion about them.

¶251 First, the majority opinion upholds the $200 million contribution credit given employers, which the legislative drafting file baldly refers to as a "contribution holiday" for employers. The monies held in the Employe Trust Fund (ETF) have been irrevocably placed in trust for the benefit of the retirement system participants, and the State cannot direct that such monies be used for non-ETF purposes. The $200 million employer contribution credit, as Justice Bablitch also explains, is a diversion of $200 million of ETF monies in which retirement system participants have a protected property and contract right.

¶252 This diversion is an unlawful taking and an impairment of contract, as well as a violation of trust principles. The Wisconsin and federal constitutions do not allow the legislature to balance the state budget or shift resources among governmental entities by using assets belonging to the ETF. Promises to contribute to the fund are assets belonging to the ETF. As a result of the majority opinion, Wisconsin now unfortunately joins other states that have viewed their once-burgeoning pension funds as sources of budget relief. [FN2]

FN2. *See* Ridgeley A. Scott, A Skunk at a Garden Party: Remedies for Participants in State and Local Pension Plans, 75 Denv. U.L.Rev. 507, 507 (1998) ("Legislators who want to spend more money than is available prefer

> to obtain the difference by a method other than raising taxes. Pension trusts for public employees are especially inviting because they frequently have substantial assets.") (citations omitted).

¶253 Second, although Act 11 has multiple benefit enhancements for both past and present employees, the majority opinion carefully avoids determining a constitutional "issue of magnitude": [FN3] Does Act 11 violate the extra compensation clause of Article IV, Section 26 of the Wisconsin Constitution? [FN4]

> FN3. *See* majority op. at ¶233.
>
> FN4. Article IV, Section 26, provides:
>
> (1) The legislature may not grant any extra compensation to a public officer, agent, servant or contractor after the services have been rendered or the contract has been entered into.
>
> ...
>
> (3) Subsection (1) shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature and such act provides for sufficient state funds to cover the costs of the increased benefits.

¶254 The majority opinion explains its dilemma in addressing this constitutional question: If Article IV, Section 26 does not apply to Act 11, the majority opinion would be holding that a simple majority vote, not a three-fourths vote, is needed to adopt a law such as Act 11. The majority opinion does not want to establish the precedent that this Act does not grant extra compensation because it wants Section 26 to remain a viable check on the legislature. [FN5]

FN5. *See* majority op. at ¶¶88, 232. I am troubled by the majority opinion's assertion that Section 26 will serve as an adequate check on the legislature in the future. *See* majority op. at ¶198. In my view, the majority opinion has undermined the effectiveness of this check by declining to enforce it in this instance. The majority opinion also relies on Joint Rule 12 even though it concludes that the rule does not correctly interpret the constitution. *See* majority op. at ¶¶91-97.

¶255 But if Section 26 does apply to Act 11, [FN6] then the majority opinion would have to hold that the monies in the ETF are "state funds" to satisfy Article IV, Section 26, because Act 11 uses assets of the ETF to fund part of the benefits. Act 11 does not appropriate any non-ETF monies to cover the costs of increased benefits. The majority opinion apparently does not want to establish the precedent that assets of the ETF are "state funds" either. [FN7]

N6. *See* majority op. at ¶87, indicating that Article IV, Section 26 applies to Act 11.

FN7. *See* majority op. at ¶232.

¶256 To avoid this dilemma, the majority opinion explains that the State Engineering Association failed to argue this point with sufficient clarity or conviction to make the majority feel bound to address the question. [FN8] The State Engineering Association has requested that the court determine what "state funds" means in the Wisconsin Constitution, in the context of this case. [FN9] Its argument is sufficient.

FN8. *See* majority op. at ¶233.

FN9. It is problematic to suggest that the legislature revisit the meaning of "state funds" in Article IV, Section 26, unless the majority opinion is referring to a constitutional amendment. *See* majority op. at ¶234.

¶257 Furthermore, the focus in the majority opinion on whether Act 11 provides state funds ignores the fact that the

legislature has not provided *sufficient* state funds to finance these benefit improvements, as Article IV, Section 26 requires. With the $200 million credit to employers and the $4 billion transfer from the TAA, Act 11 funds only a portion of the cost of the increased benefits for prior service. [FN10]

> FN10. For this fact, we need look no further than the subject line of the Legislative Reference Bureau's fiscal estimate form, which accompanied Assembly Bill 495. The subject line states that the act "make[s] several benefit improvements to the WRS and fund[s] them *partially* by recognizing $4 billion from the TAA." (Emphasis added.)

¶258 I see no other conclusion than that the increased benefits for past service provided in Act 11 are unconstitutional.

¶259 As to the severability of unconstitutional portions of Act 11, I agree with the respondents (the defenders of the constitutionality of Act 11) that the funding and benefit provisions are not severable. In other words, if any funding provisions are unconstitutional, the benefit provisions relating thereto cannot stand.

¶260 Despite my disagreement with the majority opinion about the constitutionality of Act 11, I think the majority opinion sets forth important precedent that helps to limit the possibility of future intrusions on the state pension fund.

¶261 In particular, two facets of the majority opinion bear repeating. One, the majority upholds the statutory adjustment to actuarial assumptions only to the extent that the legislature does not interfere with the ETF Board's discretion. [FN11] In concluding that the ETF Board must always have the final word regarding actuarial assumptions, the majority implicitly sides with the petitioners on this issue. The petitioners expressed fear that Act 11 might pave the way for future changes to the actuarial assumptions that could interfere with the ETF Board's authority. The majority opinion does not allow for this possibility.

FN11. *See* majority op. at ¶211.

¶262 Two, the majority opinion leaves open the possibility that employees as a class may have a viable cause of action should they have to make contributions to the employee reserve as a result of the $200 million credit to employers. *See* majority op. at ¶¶180-81. The majority has simply concluded that under the facts of this case, the possibility of a future employee contribution increase is too speculative a basis for deeming Act 11 unconstitutional. However, were the legislature to authorize a larger employer credit, or were the legislature to authorize employer credits on a regular basis, this court might view the potential for employee contributions as more than mere speculation and as a viable basis for challenging the constitutionality of such future credits.

¶263 For the reasons set forth, I dissent.

¶264 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

Theresa M. Hottenroth
Whyte Hirschboeck Dudek, S. C.
One East Main St., Ste 300
Madison, WI 53703

The court has entered the following order:

Case No. **99-3297-OA**
WI Professional Police Assoc. v. George Lightbourn

The court having considered the Motion for Reconsideration filed in the above matter,

IT IS ORDERED, that the Motion for Reconsideration is denied, with $50.00 costs.

/s/Cornelia G. Clark
Clerk of Supreme Court

APPENDIX B

STATE OF WISCONSIN
SUPREME COURT

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC., et al.

Case No: 99-3297-OA

Petitioners,

v.

GEORGE LIGHTBOURN, SECRETARY OF THE WISCONSIN DEPARTMENT OF ADMINISTRATION, et al.

Respondents.

STIPULATION OF FACTS

INTRODUCTION

a. The parties hereto by their respective attorneys stipulate to the following facts pertaining to the above-captioned matter.

b. Subject to the approval of the Court, the following agreed statement of facts and conclusions of law is submitted for the purpose of resolving factual matters and related conclusions of law about which there are no disputes. Unless otherwise noted, this Stipulation is accurate for facts and law in effect at the effective date of the disputed provisions of 1999 Wis. Act 11.

c. The facts stated herein shall not require further proof. The parties specifically reserve the right to make arguments as to the weight, if any, to be given to any fact contained in this stipulation.

d. The parties also stipulate to the admission and

authenticity of the exhibits listed on the exhibit list and attached thereto. [Exhibit List is not attached as part of this Appendix.] All exhibits are public documents and are stipulated to be true copies of the documents. To the extent that the exhibits contain legal conclusions, the parties do not stipulate to those legal conclusions.

I. PARTIES

1. The parties to this litigation are identified in Attachment A attached hereto.

II. FACTUAL AND STATUTORY BACKGROUND

A. DESCRIPTION OF WISCONSIN RETIREMENT SYSTEM, THE TRUST FUND, GOVERNING BOARD AND AGENCY

2. The Wisconsin Retirement System (hereafter referred to as the "WRS") is a system for providing benefits as provided in § 40.20, Wis. Stats.[1]

3. As provided in § 40.01(1) and (2), the public employee trust fund (hereafter referred to as the "Trust Fund") was created for the purpose of aiding public employees in protecting themselves and their beneficiaries against the hardships of old age, disability, death, illness and accident. Pursuant to § 40.01(2), it is a "public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515 (1) (um) or (ut) or 40.04 (2), and shall not be used for the purposes of any other benefit plan."

---

[1] Unless otherwise noted, all statutory references are to the Wisconsin Statutes.

4. The Employe Trust Funds Board (hereafter referred to as the "ETF Board") is a Board created by § 15.16. Each member of the ETF Board is a trustee of the Trust Fund. § 40.01(2). The ETF Board has the purposes, powers and duties defined in Ch. 40 and § 15.16 (intro).

5. The Wisconsin Department of Employe Trust Funds (hereafter referred to as the "DETF") is a Wisconsin state agency created under the direction and supervision of the ETF Board by Chapter 15, Wis. Stats. DETF administers the Trust Fund. § 40.01(2). DETF and its secretary administer the WRS and other benefit programs for state and municipal employees including teachers as set forth in Chapter 40.

6. Originally there were several independent retirement systems for specific groups of Wisconsin public employees. Efforts began in 1945 to consolidate many of these systems. 1981 Wis. Law 96 (effective January 1, 1982), in general, completed implementation of the merger of various Wisconsin public retirement systems and created the WRS.

B. NATURE OF WRS PLAN

7. The WRS is a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan.

8. The WRS is a defined benefit plan to the extent that its eligible participants are eligible to receive a specific retirement benefit calculated pursuant to the following formula:

(creditable service) x (final average earnings)

x (formula multiplier)

x (actuarial adjustment for retirement

prior to the normal retirement date)

9. The elements of the formula are:

a. "creditable service" as defined at §

40.02(17).

b. "final average earnings" as defined at § 40.02(33).

c. "normal retirement date" as defined at § 40.02(42).

d. formula multipliers as set out at §§ 40.23(2)(b)1-4 and 40.23 (2m)(e)1-4.

e. when applicable, the actuarial reduction for early retirement as described in §§ 40.23(2)(d) and 40.23(2m)(f).

10. Different percentage multipliers are used for calculating the formula benefits to be paid to different categories of participating employees. §§ 40. 23(2)(b)1-4 and 40.23 (2m)(e)1-4.

11. The WRS is also a defined contribution plan to the extent that participating employees and employers pay a percentage of payroll as required contributions into the Trust Fund. For each participant in the WRS, individual accounts are maintained, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated contributions (including interest) plus an amount from the employer reserve equal to the participant's accumulated required contributions. § 40.23(3).

C. THE FIXED RETIREMENT INVESTMENT TRUST ("FRIT") AND ITS ACCOUNTS

12. Within the Trust Fund, there is a variable retirement investment trust and a fixed retirement investment trust. § 40.04(3). There are 12 accounts and reserves within the

fixed retirement investment trust. Their respective balances[2] on December 31, 1998, were as follows:

§40.65 Duty Disability Reserve	$ 47,912,038.40
Income Continuation Insurance (ICI) Reserve	$ 55,291.538.90
Long Term Disability Insurance (LTDI) Reserve	$ 188,960,072.76
Accumulated Sick Leave Conversion Credits	$ 434,094.818.28
Milwaukee Death Benefit	$ 814,761.45
Milwaukee Retirement Systems	$ 134,544,137.08
§62.13 Police and Fire	$ 88,844,880.52
WRS Employer Accumulation Reserve	$11,499,288,736.30
WRS Employe Accumulation Reserve	$ 9,987,724,653.81
WRS Annuity Reserve	$ 4,814,357,200.58

[2] The total of these 12 account and reserve balances ($48,758,037,423.38) is not equal to the fixed retirement investment trust balance on December 31, 1998 ($48,760,807,028), because of non-investment related receivables and payables which impact the reserve balance, but not the investment balance. Reserves include amounts receivable and payable which have been booked, even though the actual payment has not been received yet, or actually made. The fixed retirement investment trust total reflects amounts actually paid in, or out, on that date, not amounts merely receivable or payable.

WRS Undistributed Earnings [3]	$ 11,433,624.91
Transaction Amortization Account (TAA)	$11,494,770,960.39

Source: Balances extrapolated from data in the 1998 Comprehensive Annual Financial Report, Department of Employe Trust Funds (Exhibit 3). [Exhibit 3 is not part of Appendix.]

13. All of these accounts and reserves are affected by Act 11 except the Milwaukee Retirement Systems Account and the undistributed earnings account, neither of which is credited with annual effective rate interest.

14. Three of the reserves and one account are of principal concern to the understanding of the effects and intent of Act 11. First, there is an employee accumulation reserve account, created by § 40.04(4), into which are deposited the contributions required from employes, whether or not the employer has elected to "pick up" these contributions and pay them on behalf of the employee. Second, there is an employer accumulation reserve account, created by § 40.04(5), into which are deposited the contributions required from employers, plus all benefit adjustment contributions, whether paid by employees or employers, and such other amounts as provided in § 40.04(5), including any amounts which cannot be credited to individual participant accounts because of a 5% limit on annual interest crediting. Third, there is an annuity reserve account, created by § 40.04(6), into which are transferred funds from the first two reserves, for the purpose of paying each annuity from the WRS. When a participant elects to take an annuity, the balance of the participant's account in the employe accumulation reserve is transferred into the annuity reserve and held there to fund the

[3] The undistributed earnings account is a result of the fact that effective rate interest is determined to only one decimal place as provided in § 40.02(23)(a). The amounts not immediately distributed as a result of disregarding fractions of less than one-tenth of 1% accumulate in the undistributed earnings account until the next distribution of earnings.

annuity benefit. Any additional amount necessary to equal the present value of the annuity is transferred from the employer accumulation reserve to the annuity reserve account. Fourth, there is the transaction amortization account created by § 40.04(3), (hereafter referred to as the "TAA"), that accounts for realized and unrealized gains and losses from the Trust's investments. § 40.04(3). For example, both the actual profit realized from the sale of shares of stock, and the change in market value of shares of another stock still held by the Trust, and therefore as yet unrealized, would be amounts credited to the transaction amortization account. In this case, these reserves and account are referred to as the "FRIT."

15. The FRIT receives funds from three sources: (1) contributions from or on behalf of participating employees; (2) contributions from participating employers; and (3) investment earnings on the employee and employer contributions. The total balance of the FRIT on December 31, 1998, was $48,760,807,028, including the TAA.

16. Within the employe accumulation reserve, an account is maintained for each participant. § 40.04(4)(a). As of January 1, 1999, there were 352,659 individual participant accounts in the employe reserve account.

17. The employer accumulation reserve is maintained without regard to the identity of any individual employer or participant. The employer accumulation reserve is used to fund benefits to WRS annuitants and beneficiaries pursuant to § 40.04(5).

18. The year-end book values of the employer, employe and annuity reserves, the undistributed earnings account, the transaction amortization account and the total of these reserves and accounts for December 31, 1990 through December 31, 1999 were as follows:[4] [See Appendix R for table]

[4] The 1998 year-end book value of the employer accumulation reserve account that appears in the following table is $2.2 billion less than the balance for the same reserve reported at page 43 of the Comprehensive Annual Financial Report, Wisconsin Department of Employe Trust Funds 1998 (Exhibit 3) ("1998 Annual Report"). This is because the balances

D. HISTORY AND PURPOSE OF THE TAA

19. Prior to 1973 Act 137 all gains and losses of the fixed retirement investment trust were fully distributed in the year the gain or loss was realized; this led to contribution and benefit rates that fluctuated or had the potential to fluctuate annually. In 1975, per Chapter 137, Laws of 1973, the TAA was first implemented.

20. The TAA is an accounting mechanism which holds the gains and losses of the fixed retirement investment trust as they occur. Such gains and losses are recognized over a period of years. Each recognition from the TAA is distributed to the other reserves and accounts of the fixed retirement investment trust (except the Milwaukee Retirement Systems account and the undistributed earnings account) in the same ratio as each account's average daily balance within the fixed retirement investment trust bears to the total average daily balance of all participating accounts in the fixed retirement investment trust (§ 40.04(3)(a)) by crediting interest to the reserves and accounts at the "effective rate" defined in § 40.02(23)(a).

21. Since 1975, a percentage of the balance of the TAA has been periodically recognized. § 40.04(3)(a) and previously § 40.06(3)(a), 1975-1979. From 1975 to 1988, 7% of the TAA balance was distributed annually. Starting in 1989, 20% of the TAA balance has been distributed annually. 1989 Wis. Act 13; § 40.04(3)(a).

22. In July, 1987, pursuant to 1987 Wis. Act 27,

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reported in the 1993 Annual Report are derived from the audited financial statements for the Trust Fund as prepared by the Trust Fund's accountants who report the $2.2 billion in unfunded liabilities as part of the employer reserve. The balances in the following table reflect the balances as actuarially determined which means the $2.2 billion in unfunded liabilities is treated as future contributions not as part of the existing reserve. There may be variances between the balances reported in the following table and those reported in Annual Reports of the Trust Fund from other years because of the difference between audited financial statements and actuarially determined balances.

§684r, creating s. 40.04(3)(e)1., in addition to the annual TAA recognition, $230 million of the balance in the TAA was recognized, thereby increasing the balances in the three FRIT reserve accounts, to fund, in part, a special investment performance dividend. Parts of 1987 Wis. Act 27 were challenged and ruled unconstitutional, without actually addressing the $230 million TAA transfer itself. In 1989, Wis. Act 13 directed $500 million to be distributed from the TAA in addition to the annual TAA recognition. Those monies were used to fund the cost of early retirement benefits enacted by that legislation. This 1989 legislation was not challenged in court.

23. The 1973 legislation creating the TAA also created a new basis of accounting for the assets of the Trust Fund. Originally, the assets of the Trust Fund were valued at par for bonds and costs for stocks with a few variations. Beginning at the time the TAA was created, the difference between par and the purchase price for bonds was credited (or debited) to the TAA, and only realized gains and losses were credited (or debited) to the TAA. In 1985, there was a change to valuing stocks on a market basis, that is, realized and unrealized gains and losses were credited to the TAA. In 1989, the valuation for bonds, other fixed income investments and real estate investments was changed to market-based values.

24. The following table provides the history of the TAA through December 31, 1999:

TRANSACTION AMORTIZATION ACCOUNT("TAA") HISTORY (MILLION $)

Year	TAA Balance Prior To Annual Distribution	Annual Distribution		TAA 12/31 Balance
1975	(28.1)	(2.0)	7%	(26.1)
1976	(18.1)	(1.3)	7%	(16.8)
1977	(0.5)	(0.0)	7%	(0.4)
1978	13.4	0.9	7%	12.5
1979	21.1	1.5	7%	19.6
1980	56.5	4.0	7%	52.6
1981	147.8	10.3	7%	137.5
1982	271.8	19.0	7%	252.8
1983	494.6	34.6	7%	459.9
1984	671.2	47.0	7%	642.2
1985	1,892.4	32.5	7%	1,759.9
1986	2,153.7	150.8	7%	2,002.9
1987	1,889.6	346.2+	7%	1,543.5
1988	2,400.2	168.0	7%	2,232.2
1989	3,732.9	1,146.6++	20%	2,586.3
1990	1,324.3	264.9	20%	1,059.5
1991	3,507.0	701.4	20%	2,805.6
1992	3,723.0	744.6	20%	2,978.4
1993	5,389.1	1,077.8	20%	4,311.3
1994	3,095.1	611.1	20%	2,484.0
1995	7,365.1	1,473.0	20%	5,892.1
1996	9,256.4	1,851.3	20%	7,405.1
1997	12,251.3	2,450.2	20%	9,801.1
1998	14,368.5	2,873.7	20%	11,494.8
1999	17,387.7	3,477.5	20%	13,910.2

\+ Includes a lump sum distribution of $230 million in addition to the annual percentage distribution.

++ Includes a lump sum distribution of $500 million in addition to the annual percentage distribution.

25. Act 11 eliminates the TAA over a five year period and replaces it with another accounting mechanism known as a market recognition account (hereafter referred to as the "MRA") that is to be used for distributing the total market value of investment returns earned by the fixed retirement investment trust. The MRA serves a smoothing purpose as does the TAA but is intended to distribute investment earnings and losses in a manner more directly related to market performance. The total balance of the TAA as of December 31, 1999 (after the annual recognition and the special $4 billion recognition) will be frozen and distributed over five years.

E. EMPLOYER/EMPLOYEE CONTRIBUTIONS, FUNDED PRIOR SERVICE LIABILITY

26. Employes' required contributions to the Trust Fund are set by statute as a percentage of each payment of earnings depending upon the category of participating employe (i.e., general, elected and state executives, protectives under social security, or protectives not under social security). § 40.05(1). Also set by statute are benefit adjustment contributions, which are required to be paid by or on behalf of certain categories of participating employes, adjusted by the ETF Board upon the advice of the actuary, and are deposited into the employer reserve. § 40.05(2m). Since 1989, § 40.05(2n), has provided that if the ETF Board determines that any contribution rate increase or decrease is necessary, the increase or decrease must be split between employers and employees. Specifically, one half of any increase or decrease must be provided by an increase or decrease in the benefit adjustment contribution under § 40.05(2m). The required employe contribution rates set by § 40.05(1)(a) can be affected by benefit adjustment contributions. § 40.05(2n) and (2m).

27. Every three years, the WRS consulting actuary conducts a general investigation of the WRS relating to mortality, disability, retirement, separation, interest, employe earnings rates and any other factors deemed pertinent and certifies, as a result of each investigation, the actuarial assumptions to be used for computing employer contribution rates. The most recent tri-annual study is dated November 26,

1997. The assumptions contained in the most recent study were used in calculating the employer required contribution rates for 1999 and 2000, and would, in the normal course, be used for the year 2001 unless the actuary recommends, and the board approves, the use of different assumptions based on changed economic circumstances. The next three year study is due in December of 2000.

28. Employer-required contribution rates, expressed as a percentage of payroll, and assessed against all participant employers, are not set in the statutes but are, instead, determined as part of each annual actuarial evaluation of the WRS. Each year the WRS consulting actuary evaluates the funding requirements for the system in order to meet the costs of estimated future retirement benefits for participants utilizing the actuarial assumptions determined pursuant to the consulting actuary's tri-annual review. This valuation process is typically conducted during the late spring of each year. The annual contribution rate developed for employers is the amount sufficient to fund such costs (called "normal costs") net of all revenues received from the statutory employe-required contributions, the benefit adjustment contributions and those investment earnings credited as current income. The employer contribution rates developed by the actuary are presented to the ETF Board for formal approval and become effective on the next January 1.

29. One of the actuarial assumptions used to determine employer contributions is the "assumed rate," defined in § 40.02(7) as "the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis." Prior to Act 11, § 40.02(7) set the "assumed rate" at 7.5% (subject to modification by the ETF Board as provided in that statute). In 1992, the ETF Board, upon recommendation of the actuary, changed the assumed rate to 8%, and has used that assumed rate for purposes of determining contribution rates for calendar years 1993 through 2000.

30. Another of the actuarial assumptions used to value the liabilities of the WRS is an assumption for across-the-board salary increases. Prior to Act 11, § 40.02(7) set the actuarial

assumption for across-the-board salary increases at 1.9% less than the assumed rate (subject to modification by the ETF Board as provided in that statute). The assumption for across-the-board salary increases has been changed by the ETF Board, upon the recommendation of the actuary, at various times. The actuary's three year investigation dated 1988, recommended (and the Board approved) changing the salary increase assumption from 6.0% to 5.6%. The actuary's three year investigation dated 1994 recommended (and the Board approved) changing the salary assumption from 5.6% to 5.3%. The actuary's three year investigation dated 1997 recommended (and the Board approved) changing the salary assumption from 5.3% to 4.8%.

HISTORY OF ACTUARIAL ASSUMPTIONS AND RELEVANT DETERMINATION DATES

ETF Board Meeting in	Setting Contr. For	Relied Upon Actuary's Year-end Valuation for	Used following actuarial assumptions for: Invest. ret.	Salary Increase
1999	2000	1998	8.0%	4.8%
1998	1999	1997	8.0%	4.8%
1997	1998	1996	8.0%	5.3%
1996	1997	1995	8.0%	5.3%
1995	1996	1994	8.0%	5.3%
1994	1995	1993	8.0%	5.6%
1993	1994	1992	8.0%	5.6%
1992	1993	1991	8.0%	5.6%
1991	1992	1990	7.8%	5.6%
1990	1991	1989	7.8%	5.6%
1989	1990	1988	7.5%	5.6%
1988	1989	1987	7.5%	6.0%
1987	1988	1986	7.5%	6.0%
1986	1987	1985	7.5%	6.0%
1985	1986	1984	7.5%	6.0%

31. In addition to the annually required employer contributions, employers are required to pay contributions for any unfunded prior service liability (hereafter referred to as "unfunded liability") that is owed to the WRS. § 40.05(2)(b). An employer's unfunded liability is the result of granting credit under the WRS for services rendered by an employe before the employer joined the WRS and the increase in those liabilities resulting from subsequent benefit improvements.

32. Employer contribution rates for the payment of unfunded liability are currently amortized over 40 years. § 40.05(2)(b). An employer must continue to make contributions toward its unfunded liability, plus interest at the assumed rate

(§ 40.05(2)(b)), until the entire debt has been paid to the WRS. § 40.05(2)(bm). Because the unfunded liability contribution is a percentage of the employer's WRS-covered payroll, changes in the covered payroll mean the employer may be making actual payments that are greater, or less, than the annual amount necessary to actually pay the employer's unfunded liability in exactly 40 years. Employers may pay contributions for unfunded liability in advance, and some employers have done so. § 40.05(2)(bg). The present unfunded liability for all employers totals approximately $2.2 billion.

33. The unfunded liabilities of employers have been recalculated following adjustments to the actuarial assumptions that govern overall funding requirements for the WRS. In 1989, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.5% to 7.8%, the DETF recalculated the remaining unfunded liabilities using the new assumed rate. As a result, the aggregate unfunded liabilities of all employers as carried on DETF's books, was reduced by $90,589,521. In 1991, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.8% to 8.0%, the DETF recalculated the remaining unfunded liabilities using the new assumed rate. As a result, the aggregate unfunded liabilities of all employers as carried on DETF's books, was reduced by $59,477,500. No legal challenge to this action was made. In 1994, when the actuary recommended (and the Board approved) changing the across-the-board salary increase assumption from 5.6% to 5.3%, the DETF recalculated the remaining unfunded prior service liabilities of employers, using the new salary inflation assumption. As a result, the aggregate unfunded liabilities of all employer as carried on DETF's books was reduced by $85,117,420. No legal challenge to this action was made.

34. However, in February, 1998, the Secretary of the DETF asked the Attorney General whether the ETF Board had authority to adjust the employer's unfunded liability, to reflect later adjustment to actuarial assumptions. On January 15, 1999, Assistant Attorney General Jane Hamblen replied on behalf of the Attorney General, stating that there is no statutory authority for the ETF Board to adjust the employer's unfunded

liability balance even when the WRS actuary subsequently recommends changes in the actuarial assumptions that were used when the initial unfunded liability balance was determined. Since receipt of the reply, the ETF Board has indicated it will act consistent with the position expressed in the January 15, 1999 reply. Exhibit 10. [Exhibit 10 is not included as part of Appendix]

35. Prior to Act 11, when funds have been recognized from the TAA to the employer accumulation reserve account, whether annual or one-time recognitions, the funds have not been credited to an individual employer in order to reduce that employer's unfunded liability as defined in § 40.05(2)(b). In 1989, however, pursuant to 1989 Act 13, § 47(2), the Legislature authorized – if recommended by the actuary – the use of the employer accumulation reserve's portion of the special $500 million transfer, after the liabilities created by 1989 Act 13 had been funded, for credits to individual employer's unfunded prior service liability accounts. According to the DETF, all of the portion of the $500 million transfer credited to the employer accumulation reserve was necessary to fund liabilities created by 1989 Act 13, and no amounts were allocated as credits toward any employer's unfunded liability under this provision.

F. PARTICIPATING EMPLOYERS

36. As of December 31, 1998, there were 1,194 different employers participating in the WRS. These employers included the State, counties, cities, towns, villages, school districts, library districts, other governmental units and instrumentalities of two or more units of government created within the State of Wisconsin. See §§ 40.02(28), 40.02(47), and 40.21. The State of Wisconsin's WRS covered payroll in 1998 was $2,386,019,525. The total covered payroll of all WRS participating employers in 1998 was $8,476,550,873.

G. WRS PARTICIPANTS

37. A "participant" means any person included within the WRS by virtue of being or having been a

participating employe whose account has not been closed under § 40.25(1), (2) or (2m). § 40.02(45).

38. A "participating employe" is an employe who is currently in the service of, or an employe who is on a leave of absence from, a participating employer under the WRS and who has met the requirements for inclusion within the provisions of the WRS under § 40.22. §40.02(46).

39. WRS participants and employes are further categorized as follows:

a. A "protective occupation participant" includes those participants described in § 40.02(48), including police officers, sheriffs and firefighters.

b. An "elected official" (except as otherwise provided in § 40.02(48)) means a participating employe who is: (a) a supreme court justice, court of appeals judge, circuit judge or state, county or municipal official elected by vote of the people; or (b) appointed as provided by statute to fill a vacancy in a position specified in (a); and (c) the chief clerk and sergeant at arms of the senate and assembly. § 40.02(24).

c. An "executive participating employe" is defined in § 40.02(30).

d. A "general employe" is any employe not defined as an executive participating employe, an elected official, or a protective occupation participant.

40. An "annuitant" is a person receiving a retirement annuity, beneficiary annuity or a disability annuity from the WRS, including a person whose disability annuity has been suspended. § 40.02(4).

41. An "inactive participant" is a participant who is not an annuitant or a participating employe.

42. There are two categories of "inactive participants" which are relevant to this litigation. In one group are those who first became covered by the WRS (or its predecessor systems) on or before January 1, 1982 or who first became covered by the WRS after January 1, 1982 but left participating employment before March 9, 1984 (hereafter referred to as the "effective rate inactive participants"). The effective rate inactive participants' accounts in the employe reserve are credited each year with interest at the "effective rate" as defined in § 40.02(23). The other group of inactive participants are those who first became covered by the WRS on or after January 1, 1982 and who were still participating employes on March 9, 1984 (hereafter referred to as the "5% rate inactive participants"). The 5% rate inactive participants' accounts in the employe reserve are credited each with interest at the rate of 5%. §§ 40.04(4)(a)(2) and 40.02(6).

43. There are currently approximately 461,208 participants in the WRS, including approximately 254,649 active employes, 102,817 annuitants and 103,712 inactive employes who remain participants in the WRS. All participants fall into one of four different categories, with a different formula multiplier applicable to each group, as established in § 40.23(2m)(e)1.,2.,3. and 4. There are approximately 2,671 protective occupation participants who are not subject to Titles II and XVIII of the federal Social Security Act and 16,739 protective occupation participants who are subject to the Social Security Act. There are about 1,559 elected officials and executive participating employes. The remaining approximately 233,710 participating employes are categorized as "general" employes.

44. There are an estimated 60,000 inactive WRS participants who are credited with interest at the assumed rate of 5% annually rather than at the effective rate. Of these, DETF estimates 51,000 will retire and take a WRS annuity, instead of electing to take a separation benefit or dying before reaching retirement age.

H. DIFFERENCES BETWEEN GROUPS AND CATEGORIES OF PARTICIPANTS.

45. Distinctions exist between groups and categories of participants. Benefits vary among different groups and categories of participants. For example, benefits vary depending on when the participant joined the WRS, whether the participant became inactive prior to qualifying for a retirement benefit, or when the participant retired.

46. Different participant categories have different formula multipliers (§§ 40.23(2)(b)(1,2,3 ,4) and (2m)(e) (1,2,3,4)):

1.6% - general/teachers
2.0% - elected/executives
2.0% - protectives with Social Security
2.5% - protectives without Social Security

47. Different participant categories have different "normal retirement ages" at which participants can receive benefits unreduced by actuarial adjustment (§ 40.02(42)):

General/teachers:	65, or 57 with 30 years of service
Protectives:	54, or 53 with 25 years of service
Elected/Executives	62, or 57 with 30 years of service

48. The minimum retirement age (for early retirement with reduced benefits) for protectives is 50 but for all other categories it is 55. § 40.23(1)(a).

49. Participant categories have different contribution rates to reflect the differing liabilities to the WRS resulting from their respective benefits:

1999 Contributions (percent of payroll)

	General	Protectives with Social Security	Protectives without Social Security	Elected / Execs.
Employe				
Normal	5.0%	4.9%	5.4%	4.3%
Benefit Adjustment	0.8%	0.0%	0.0%	0.0%
EMPLOY-ER				
Normal	4.4%	8.0%	12.8%	9.8%
Prior Service (average)	1.4%	0.9%	1.5%	1.0%
Duty Disability (aver.)		3.7%	3.7%	-----
TOTAL	11.6%	16.6%	23.4%	15.1%

II. CHANGES CREATED BY AND THE IMPACT OF ACT 11

A. ENACTMENT OF ACT 11

50. AB 495 which became 1999 Wis. Act 11 was introduced on October 1, 1999. During the drafting process, the

Senate Committee on Organization received a report dated July 1999 prepared by the Board's actuary entitled "Wisconsin Retirement System Actuarial Valuations of Alternate Benefit and Financing Provisions." Exhibit 12. [Exhibit 12 is not included as part of the Appendix]

51. The Assembly considered and rejected Assembly Amendment 3, which provided:

> NONSEVERABILITY. Notwithstanding section 990.001(11) of the statutes, if a court finds that any provision of this act is unconstitutional, the entire act is void.

52. On October 6, 1999, AB 495 was passed in both the Assembly and the Senate by the following vote: Assembly: 79 ayes and 20 noes; Senate: 23 ayes and 10 noes. AB 495 did not pass the Senate by a three-fourths vote. Act 11 appears in the record as Exhibit 1. [Exhibit 1 is not included as part of Appendix.]

53. The Board's actuaries delivered in November, 1999 to the Joint Survey Committee on Retirement Systems a report entitled "Wisconsin Retirement System Actuarial Valuations of Benefit and Financing Provisions of AB 495." Exhibit 13. [Exhibit 13 is not included as part of Appendix.]The Governor signed Act 11 on December 16, 1999.

54. The changes to the WRS made by Act 11 were not needed or necessary to preserve the actuarial soundness of the Trust Fund or to salvage the Trust Fund. The Trust Fund is not financially troubled and implementation of Act 11 by itself will not make it so.

B. <u>$4 BILLION TAA RECOGNITION</u>

55. Act 11 provides that, on December 31, 1999, $4 billion is to be distributed from the TAA to the other reserves and accounts of the fixed retirement investment trust in an

amount equal to a percentage of the total distribution determined by dividing each reserve's and account's balance on January 1, 1999 by the total balance of the fixed retirement investment trust on January 1, 1999. Act 11, § 27(1)(a). Most of the $4 billion distribution is to be recognized into the employer, employe and annuity reserves. The DETF interprets this provision to mean that the $4 billion transfer should be included in the investment earnings used to establish the effective rate for interest crediting as that rate is described in § 40.02(23)(a).

56. A portion of the recognition of $4 billion from the TAA funds benefit improvements created by Act 11.

C. $200 MILLION EMPLOYER CREDIT ACCOUNT

57. Act 11 provides that $200 million of the increase in the employer reserve that results from the distribution of $4 billion from the TAA will be used to establish contribution credits for satisfaction of required payments that employers have regarding unfunded liability. Any credits in excess of an employer's unfunded liability will be used to make payments for their required annual employer contributions under the WRS. During the period in which the credits are used, the employers that have unfunded liability will not be required to make payments for unfunded liability, and those employers that do not have unfunded liability (or have credits in excess of such unfunded liability) will not be required to make annual employer-required contributions until their respective credits are exhausted. After an employer's credits are consumed, the employer is required to resume making required employer contributions. Act 11, §§ 27(1)(a) and (b)1.

58. DETF has made preliminary calculations regarding the effect on each participating employer of the $200 million credit. These calculations are summarized in the following chart by type of employer, and the impact on individual participating employers is contained in Exhibit 14. [Exhibit 14 is not included as part of Appendix] [See Appendix S for fold-out chart).

59. But for the provisions of Act 11, § 27(1)(a) and (b)1, the current recognition of $4 billion from the TAA would not result in $200 million being applied as a credit toward required payments due from participating employers for unfunded liability or current contributions. Instead, the $200 million would be part of the total balance of the employer reserve considered by the actuary as one of several factors to determine contribution rates.

60. Brian Murphy, of the firm, Gabriel, Roeder and Smith, the WRS actuary, estimates (based upon the same data and assumptions used to prepare the actuary's November, 1999 report (Exhibit 13) [Exhibit 13 is not included as part of Appendix.} that if the $200 million transferred into the employer accumulation reserve and earmarked for the exclusive purpose of an employer credit account by Act 11 were not so reserved, these funds would reduce the required contribution percentage rates which would be effective as of January 1, 2001 for each category of WRS employe by the following:

General category employes	0.02% (i.e., 11.6% - 0.02% = 11.58% total)
Elected officials and executives	0.03% (i.e., 15.1% - 0.03% = 15.07% total)
Protectives with Social Security	0.03% (i.e., 16.6% - 0.03% = 16.57% total)
Protectives without Social Security	0.04% (i.e., 23.4% - 0.04% = 23.36% total)

Contribution rates are established to the nearest tenth of a percent. No change in contribution rates will actually occur unless the change is at least 0.2%. Changes too small to be implemented are deferred and affect the next evaluation of contribution rates. Releasing $200 million in the employer reserve from the restriction that it may only be used to pay employer contributions would therefore, standing alone and in

the absence of other influences on contribution rates, not cause an immediate change in contribution rates.[5]

D. INCREASED FORMULA MULTIPLIER

61. Act 11 increases the percentage multipliers used in calculating a participant's annuity for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased from 2% to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased from 2.5% to 2.665%. For all other participants in the WRS, the percentage multiplier is increased from 1.6% to 1.765%. The increase in the percentage multiplier applies to the calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service performed on or after January 1, 2000, Act 11 provides that the percentage multipliers in effect prior to Act 11 will apply. Act 11, §§ 17-20.

E. INCREASED MAXIMUM AMOUNT OF INITIAL ANNUITY

62. Under pre-Act 11 law, the maximum amount of an initial annuity for a participant in the WRS (including a protective occupation participant with social security) who receives an annuity based upon a formula benefit, is an amount equal to 65% of the participant's final average earnings ("FAE"), except for a protective occupation participant who is not covered by social security, who receives 85% of FAE. § 402.23(2m)(b). This means that the formula-based annuity of a protective occupation participant with social security (i.e., law enforcement officer) who has 32.5 or more years of creditable

---

[5] Pursuant to § 40.04(1) DETF has established an Experience Amortization Reserve (hereafter referred to as "EAR"). The purpose of the EAR is to minimize short-term contribution rate fluctuations. According to the Wisconsin Retirement System Eighteenth Annual Actuarial Valuations (Exhibit 4) [Exhibit 4 is not included as part of Appendix.] as of December 31, 1998 the EAR balance was $2.765 Billion.

service is capped. The formula-based annuity of a protective occupation participant without social security (i.e., firefighter) who has 34 or more years of creditable service is capped.

63. Act 11 increases the cap on the initial formula-based annuity for WRS participants who are not protective occupation participants with social security from 65% to 70% of FAE; it does not increase the 85%-of-FAE cap on the initial formula-based annuity for protective occupation participants without social security.

64. There are currently in the WRS, 12 protective occupation participants with social security and 29 protective occupation participants without social security who have at least 32.5 and 34 years of creditable service, respectively, who would not be eligible to receive an increase in their formula-based annuity benefit if Act 11 were implemented. However, according to DETF, because the Trust Fund's assets have enjoyed good investment performance in recent years, it appears that each of these 41 protective occupation participants, if they retired in the foreseeable future, will receive a money purchase annuity, rather than a formula-based annuity. The benefits of a money purchase-based annuity are not subject to the maximum annuity limitations.

65. Currently there are at least 39 general category employees and 5 executive or elected employees with sufficient creditable service that their formula benefits are capped under both the 65% of FAE limit and the 70% of FAE limit set in Act 11.

F. INACTIVES AND 5% ASSUMED RATE

66. Within the employe reserve, a separate account is maintained for each participant. § 40.04(4). Act 11 provides that the portion of the $4 billion TAA recognition into the employe reserve is to be credited to participants' accounts based on their account balances as of January 1, 1999, pursuant to § 40.04(4)(a)2 and 2g. Act 11, § 27(1)(c).

67. As discussed in ¶ 42 above, some of the accounts

in the employe reserve belong to "5% rate inactive participants" whose accounts are credited with 5% interest from the TAA recognitions. Some of the accounts belong to "effective rate inactive participants" whose accounts are credited with interest generated by TAA recognitions at the "effective rate" as defined in § 40.02(23). §§ 40.04(4)(a)2. and 40.02(6).

68. The "effective rate" for the fixed annuity division, as defined by § 40.02(23)(a) to be credited as of December 31, 1999, will be 13.5%, if computed without the $4 billion TAA recognition. If the $4 billion recognition is included, the effective rate will be 24.1% according to DETF calculations. In either case, the effective rate to be credited in the fixed annuity division as of December 31, 1999, will exceed 5%.

Dated this 31st day of March, 2000.

WISCONSIN PROFESSIONAL
POLICE ASSOCIATION, INC.

By: _____

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STATE ENGINEERING ASSOCIATION

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GEORGE LIGHTBOURN, SECRETARY OF THE
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WISCONSIN EDUCATION ASSOCIATION COUNCIL

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ATTACHMENT A – IDENTIFICATION OF PARTIES IN THIS LITIGATION

Petitioners

a. Petitioner Wisconsin Professional Police Association, Inc. ("WPPA") is a Wisconsin non-stock corporation that is a professional, labor and fraternal association. Most of the WPPA's 7,500 members are active or retired employees of county and municipal governments in Wisconsin. Most of the WPPA's members are active or retired law enforcement officers. Most of the WPPA's members are participants in or annuitants of the Wisconsin Retirement System ("WRS") and beneficiaries of the Trust Fund. The vast majority of the WPPA's members meet the definition of "protective occupation participants" under Section 40.02(48), Stats.

b. Petitioner John Charewicz is a deputy sheriff employed by Portage County, Wisconsin. He meets the definition of "protective occupation participant"under Section 40.02(48), Stats. He is currently an active participant of the WRS and a beneficiary of the Trust Fund.

c. Petitioner David J. Mahoney is a deputy sheriff employed by Dane County, Wisconsin. He meets the definition of "protective occupation participant" under Section 40.02(48), Stats. He is currently an active participant of the WRS and a beneficiary of the Trust Fund.

d. Petitioner Susan Armagost is a police officer employed by the City of Madison, Wisconsin. She meets the definition of "protective occupation participant" under Section 40.02(48), Stats. She is currently an active participant of the WRS and a beneficiary of the Trust Fund.

e. Petitioner Steven Urso is a retired deputy sheriff formerly employed by Dane County, Wisconsin. He meets the definition of "protective occupation participant" under Section 40.02(48), Stats. He is an annuitant of the WRS.

f. Petitioner State Engineering Association ("SEA") is a labor organization and representative of employees within the meaning of § 111.81(12) and (17), Wis. Stats. respectively and represents the approximately 1,300 employees included in the engineering bargaining unit referred to in § 111.825(1)(f)8, Wis. Stats.

g. Petitioner Thomas H. Miller is currently President of the State Engineering Association, serves on its Board of Directors, and is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the WRS.

h. Petitioner David Buschkopf is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the WRS.

i. Petitioner Ross Johnson is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the WRS.

j. Petitioner Melvin Sensenbrenner was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the WRS.

k. Petitioner Bernard Kranz was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the WRS.

Respondents

a. Respondent Jack C. Voight is the Wisconsin State Treasurer. He is also the Treasurer of the Trust Fund.

b. Respondent George Lightbourn is the Secretary of the Wisconsin Department of Administration.

c. Respondent WEAC is an unincorporated professional labor association formed under the laws of the State of Wisconsin. WEAC represents approximately 85,000 members who are involved with the WRS. Most of these members are active participants in the WRS; others are retired educational employees who are currently annuitants in the WRS. WEAC's members make up the largest organized body of individuals affected by Act 11 in the State.

d. Respondent Terry Craney is the President of WEAC and a participating employee in the WRS.

e. Respondent Stan Johnson is the Vice-President of WEAC and a participating employee in the WRS.

f. Respondent Donald Krahn is the past Executive Secretary of WEAC and an inactive participant in the WRS.

g. Respondent Margaret Guertler is a member of WEAC and a participating employee in the WRS.

h. Respondent Gerald Martin is a retired member of WEAC and an annuitant in the WRS.

i. Respondent Phyllis Pope is a retired member of WEAC and an annuitant in the WRS.

APPENDIX C

SUPREME COURT OF WISCONSIN
OFFICE OF THE CLERK
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688
Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.courts.state.wi.us

To:

December 29, 1999

Judith A. Coleman
Dane County Clerk
of Courts
City-County Bldg.,
Rm. GR-10
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709-0001

Ann U. Smith
Michael Best & Friedrich
P.O. Box 1806
Madison, WI 53701-1806

Anthony L. Sheehan
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Michael J. Van Sistine,
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Thomas M. Pyper
Theresa M. Hottenroth
Whyte Hirschboeck
Dudek, S.C.
Madison, WI 53701-1806
1 East Main Street, Suite 300
Madison, WI 53703

You are hereby notified that the Court has entered the following order:

No. 99-3297-OA Employe Trust Funds Board, et al. v. Lightbourn, et al.

Petitioners, Employe Trust Funds Board, the Department of Employe Trust Funds, and Eric Stanchfield, Secretary of the Department of Employe Trust Funds, having filed the following: (1) Petition Stand as a Complaint Seeking Declaratory Judgement, and Brief in Support Thereof; (2)

Petition for Preliminary Injunction or, alternatively, for Writ of Prohibition, and Brief, Affidavit, and Proposed Preliminary Injunction in support; and respondents, George Lightbourn, Acting Secretary of the Wisconsin Department of Administration, and Jack C. Voight, Wisconsin State Treasurer, having filed a response and joining in the request for an injunction; and proposed intervening respondents, Wisconsin Education Association Council, by its President Terry Craney and its Vice-President, Stan Johnson, and Donald Krahn, Margaret Guertler, Gerald Martin, and Phyllis Pope, having filed a Motion to Intervene, Memorandum in Support, and Response; and the court having considered the above.

IT IS ORDERED that petitioners and respondents are preliminarily enjoined from taking those actions directed by 1999 Assembly Bill 495 (1999 Wis. Act 11) and 1999 Assembly bill 584 (1999 Wis. Act 12) or otherwise implementing or enforcing this legislation until further order of this court. Notwithstanding the foregoing, the petitioners are not enjoined from taking such contingent and preparatory measures toward implementation of this legislation as they deem appropriate in their discretion and consistent with their fiduciary and other duties and responsibilities for administering the terms of the public employe trust fund. Any question raised by either party regarding the propriety of any particular contingent and preparatory measure toward implementation shall immediately be brought before this court for resolution;

IT IS FURTHER ORDERED that by January 21, 2000, respondents shall file a response to petitioner's proposed complaint seeking declaratory judgement. As part of this response, respondents shall specifically address whether they consider any factual matters raised by the petition for original action/proposed complaint to be in dispute;

IT IS FURTHER ORDERED that the disposition of the petition for original action and the motion to intervene be held in abeyance pending the court's consideration of the additional response to be filed by respondents, as well as any additional

supplemental matters the court may later order the parties or proposed intervenors to address.

/s/ Marilyn I. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
SUPREME COURT
110 E. Main Street, Suite 215
Madison, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640
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To:

May 25, 2000

William Haus
Michael E. Banks
Haus, Resnick & Roman LLP
148 East Wilson Street
Madison, WI 53703-3423

Hon. Michael J. Barron,
Reserve Circuit Court Judge
1425 E. Capitol Drive
Milwaukee, WI 53211

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Madison, WI 53703-3300

You are hereby notified that the Court has entered the following order:

No: 99-3297-OA Wisconsin Professional Police Association, Inc., et al. v. Lightbourn, et al.

The court having considered the documents filed in this case prior to its last order of March 8, 2000 and the following documents subsequently filed: (1) supplement to the complaint by the petitioners State Engineering Association, et al., (2) answers to the supplemental complaint by respondents, George Lightbourn and Jack Voight, and WEAC, et al., (3) answer to the Wisconsin Professional Police Association, Inc, et al. complaint by respondents, George Lightbourn and Jack Voight, and WEAC, et al., (4) motion for leave to file *amicus curiae* brief filed by District Council 40, AFSCME, AFL-CIO; (5) findings of fact of Reserve Circuit Judge Michael J. Barron; and (6) responses to the court's letter of May 5, 2000;

IT IS ORDERED that the petition for leave to commence an original action filed by petitioners, State Engineering Association, et al. and Wisconsin Professional Police Association, Inc., et al. are granted and this court assumes jurisdiction over this action. The Findings of Fact of April 6, 2000, incorporating the Stipulation of Fact and Stipulated Exhibits of March 31, 2000: (1) are adopted as the controlling facts in this court; (2) shall supersede any assertions/denials set forth in the pleadings; (3) shall be construed as leaving no additional material facts in dispute; and (4) shall be construed to include the finding that the Trust Fund, as changed by the subject legislation, will be actuarially sound, subject to the following qualification by the State Engineering Association, et al.

> The SEA Petitioners do not take the position that the provisions of AB 495, in and of themselves, leave the Trust Fund in a financially troubled condition, now or in the future. Notwithstanding this statement, the SEA Petitioners believe, and intend to argue, that AB 495 poses a systemic threat to the Trust Fund. If Trust Fund assets may be used to meet non-

> trust obligations, then the substantial assets of the Trust Fund are at risk for future legislative conversions that could threaten the solvency and actuarial soundness of the Trust Fund. The very ability to remove dollars from the Trust Fund either directly or indirectly, for purposes other than paying benefit commitments associated with those funds poses a significant danger to the future and security of the Trust Fund.

IT IS FURTHER ORDERED that the motion for leave to file *amicus curiae* brief of the District Council 40 is granted. Twenty-two copies of the brief shall be filed within the time indicated below,

IT IS FURTHER ORDERED that within 40 days of the date of this order the petitioners shall file briefs in this court; that within 30 days thereafter the respondents and District Council 40 shall file their responsive/*amicus* briefs; and within 20 days thereafter the petitioner shall file either their reply briefs or statements that no such briefs will be filed;

IT IS FURTHER ORDERS that this case shall be considered on an expedited basis. The clerk of this court is directed to place this case on the October, 2000 oral arguments schedule.

/s/ Cornelia G. Clark
Clerk of Supreme Court

APPENDIX D

EXCERPTS FROM 1999 WIS. ACT 11

Section 27. Nonstatutory provisions.

(1) Transfer of funds from the transaction amortization account of the fixed retirement investment trust.

(a) On December 31, 1999, after the annual distribution required under section 40.04(3)(a) of the statutes for the 1999 calendar year is made, $4,000,000,000 shall be distributed from the transaction amortization account of the fixed retirement investment trust to the reserves and accounts of the fixed retirement investment trust in an amount equal to a percentage of the total distribution determined by dividing each reserve's and account's balance on the prior January 1 by the total balance of the fixed retirement investment trust on the prior January 1.

(b)1. The employe trust funds board shall determine each participating employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a) and shall establish for each employer a credit balance in the employer accumulation reserve that equals the employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a), based on each employer's share of covered payroll in 1998. The total amount that shall be reserved for credit balances under this subdivision shall be $200,000,000. In lieu of requiring that an employer make required employer contributions under section 40.05(2)(b) of the statutes, the employe trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05(2)(b) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). For any employer that is not required to make contributions under section 40.05(2)(b) of the statutes, the employe trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer

accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05(2)(a) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). The employe trust funds board shall make such deductions until the credit balance is exhausted, at which time the employer shall resume making all required employer contributions.

2. The total amount of the increase in the employer accumulation reserve that results from the distribution under paragraph (a) and that remains after the establishment of the credit balances under subdivision 1. shall, on the recommendation of the actuary, be applied to funding any liabilities created by the treatment of section 40.23(2m)(e)1., 2., 3. and 4. of the statutes in this act.

(c) The total amount distributed to the employe accumulation reserve under paragraph (a) shall be credited to participants' accounts based on their account balances as of January 1, 1999, pursuant to section 40.04(4)(a)2. and 2g. of the statutes.

(d) The total amount distributed to the annuity reserve under paragraph (a) shall be distributed as provided under section 40.27(2) of the statutes.

(2) Purchase of legislative service.

(a) In this subsection:

1. "Employer" has the meaning specified in section 40.02(28) of the statutes.

2. "Final average earnings" has the meaning specified in section 40.02(33) of the statutes.

3. "Legislative service agency" has the meaning specified in section 13.90(1m)(a) of the statutes.

4. "Participating employe" has the meaning specified in section 40.02(46) of the statutes.

(b) Any person who is a participating employe on the effective date of this paragraph shall be granted creditable service under the Wisconsin retirement system for any service that was performed before the effective date of this paragraph as a member or employe of the legislature or employe of a legislative service agency and that has not been previously credited, if the participating employe was a member or employe of the legislature or employe of a legislative service agency for at least 600 hours during the calendar year in which the service was performed or the calendar year immediately succeeding the calendar year in which the service was performed and if, not later than the first day of the 7th month beginning after the effective date of this paragraph, the participating employe submits an application for the creditable service to the department of employe trust funds and pays to the department a lump sum equal to the employe required contribution rate under section 40.05(1)(a) of the statutes that is applicable to the service multiplied by the participating employe's final average earnings, determined as if the participating employe has terminated employment and applied for a retirement annuity under the Wisconsin retirement system on the date on which the department receives the participating employe's application for the creditable service, and by the number of months of creditable service granted under this paragraph.

(c) An employer may pay any amount payable under paragraph (b) on behalf of any participating employe.

(d) Any liability incurred as a result of granting creditable service to a participating employe under paragraph (b) that is not funded by the contributions made by the participating employe under paragraph (b), or by the employer on behalf of the participating employe under paragraph (c), shall be paid from the appropriation accounts under section 20.765(1)(a) and (b) of the statutes. The amount apportioned to section 20.765(1)(a) of the statutes and to section 20.765(1)(b) of the statutes to fund the liability shall be determined by the presiding officers of each house of the legislature.

(3) Authority of employe trust funds board. Notwithstanding any provision in this act, the employe trust

funds board shall retain the authority to maintain proper actuarial funding of the Wisconsin retirement system.

(4t) Request that supreme court take original jurisdiction. Considering the implementation of this act a matter of high public importance, the legislature requests that the supreme court take jurisdiction of any original action relating to the implementation of this act.

Section 28. Initial applicability.

(1) Calculation of contribution rates. The treatment of section 40.02(7) of the statutes first applies to the calculation of contribution rates under section 40.05(1) and (2) of the statutes for the Wisconsin retirement system for the 2001 calendar year.

(2) **Calculation of retirement benefits.** The treatment of section 40.23(2m)(b) and (e)1., 2., 3. and 4. of the statutes first applies to the calculation of retirement benefits for individuals who are participating employes in the Wisconsin retirement system on January 1, 2000.

(3) **Death benefits.** The treatment of section 40.73(1)(a)(intro.), (am) and (c) of the statutes first applies to death benefits paid to participants in the Wisconsin retirement system who are participating employes in the Wisconsin retirement system on the effective date of this subsection.

(4) **Variable annuity.** The treatment of section 40.04(7)(a)(intro.) of the statutes first applies to elections for variable annuity participation that are made by individuals who are participating employes in the Wisconsin retirement system on January 1, 2001.

(5) Calculation of unfunded prior service liability balances. The treatment of section 40.05(2)(cm) of the statutes first applies to the calculation of unfunded prior service liability balances under section 40.05(2)(b) of the statutes for the Wisconsin retirement system for the 2001 calendar year.

Section 29. Effective dates. This act takes effect

on the day after publication, except as foll[illegible]

(1) Elimination of transaction amortization account and creation of market recognition account. **The treatment of sections 25.17(14)(f), 25.18(1)(a) and** (m) and 40.04(3)(intro.), (a), (ab), (am) and (d) of the statutes takes effect on January 1, 2000.

APPENDIX E

40.01 CREATION AND PURPOSE.

(1) Creation. A "public employee trust fund" is created to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age, disability, death, illness and accident, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale, by providing for the orderly and humane departure from service of employees no longer able to perform their duties effectively, by establishing equitable benefit standards throughout public employment, by achieving administrative expense savings and by facilitating transfer of personnel between public employers.

(2) Purpose. The public employee trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515 (1) (um) or (ut) or 40.04 (2), and shall not be used for the purposes of any other benefit plan. Each member of the employee trust funds board shall be a trustee of the fund and the fund shall be administered by the department of employee trust funds. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section.

(3) Compatibility of trustee responsibilities. Membership on the employee trust funds board, group insurance board, deferred compensation board, Wisconsin retirement board and the teachers retirement board shall not be incompatible with any other public office. The board members and the employees of the department shall not be deemed to have a conflict of interest in carrying out their responsibilities and duties in administering this chapter, or taking other appropriate actions necessary to achieve the purposes of this chapter, solely by reason of their

being eligible for benefits under the benefit plans provided under this chapter. However, any board member or employee of the department is expressly prohibited from participating in decisions directly related to a specific benefit, credit, claim or application of the person and from participating in negotiations or decisions on the selection of actuarial, medical, legal, insurance or other independent contractors if the board member or employee of the department has a direct or indirect financial interest in or is an officer or employee or is otherwise associated with the independent contractor.

40.015 COMPLIANCE WITH FEDERAL TAX LAWS.

(1) The Wisconsin retirement system is established as a governmental plan and as a qualified plan for federal income tax purposes under the internal revenue code and shall be so maintained and administered.

(2) No benefit plan authorized under this chapter may be administered in a manner which violates an internal revenue code provision that authorizes or regulates that benefit plan or which would cause an otherwise tax exempt benefit to become taxable under the internal revenue code.

40.02 DEFINITIONS. In this chapter, unless the context requires otherwise:

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(7) "Assumed rate" means the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis. The assumed rate shall be a rate of 8% and the actuarial assumption for across-the-board salary increases for the purpose of valuing the liabilities of the Wisconsin retirement system shall be 3.4% less than the assumed rate unless due to changed economic circumstances the actuary recommends and the board approves a different rate. The assumed rate for a calendar year shall be used for all calculations of required contributions and reserves for participants, except as provided in s. 40.04 (4) (a) 2., 2g. and 2m., and the amount of any lump sum benefit paid instead of an annuity, except it shall not be used for any purpose for which the assumed benefit rate is to be used under sub. (6).

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(23) "Effective rate" means:

(a) For the fixed annuity division, the rate, disregarding fractions of less than one-tenth of one percent, determined by dividing the remaining fixed annuity division investment earnings for the calendar year or part of the calendar year, after making provision for any necessary reserves and after deducting prorated interest and the administrative costs of the fixed annuity division for the year, by the fixed annuity division balance at the beginning of the calendar year as adjusted for benefit payments and refunds paid during the year excluding prorated interest.

(b) For the variable annuity division, the rate, disregarding fractions less than one percent, which will distribute the net gain or loss of the variable annuity division to the respective variable annuity balances and reserves using the same procedure as provided in par. (a) for the fixed annuity division.

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40.03 POWERS AND DUTIES.

(1) Employee trust funds board. The board:

(a) Shall authorize and terminate the payment of all annuities and death benefits, except disability annuities, in accordance with this chapter and may adjust the computation of the amount, as provided by this chapter, as necessary to prevent any inequity which might otherwise exist if a participant has a combination of full-time and part-time service, a change in annual earnings period during the high years of earnings or has previously received an annuity which was terminated.

(am) Shall ensure that the Wisconsin retirement system complies with the internal revenue code as a qualified plan for income tax purposes and shall ensure that each benefit plan is administered in a manner consistent with all internal revenue code provisions that authorize and regulate the benefit plan.

(b) Shall approve the tables to be used for computing benefits under the Wisconsin retirement system after certification of the tables in writing by the actuary.

(c) Shall appoint the secretary of the department and may employ or select any medical, legal and other independent contractors as are required for the administration of the fund.

(d) Shall select and retain an actuary or an actuarial firm, under one or more contractual agreements which shall run to the department for the purpose of performing all actuarial services which are necessary for the operation and control of each of the insurance and benefit programs under this chapter. Under this paragraph, the board shall:

1. Determine the requirements for and qualifications of the actuary or the actuarial firms so retained.

2. Determine the terms and conditions of each contractual agreement, and the time any contractual agreement shall be in force.

3. Determine the procedure for the selection of an actuary or an actuarial firm.

4. Direct the secretary to sign on behalf of the department any contractual agreement approved by the board.

(e) Shall approve the contribution rates and actuarial assumptions determined by the actuary under sub. (5) (b) and (c).

(f) May compel witnesses to attend meetings and to testify upon any necessary matter concerning the fund and authorize fees not in excess of the statutory provisions for witnesses.

(g) May determine the length of creditable prior service from information available. Any determination shall be conclusive as to any period of service unless, within the time

limits specified in s. 40.08 (10), the board reconsiders any case and changes the determination.

(h) May accept any gift, grant or bequest of any money or property of any kind, for the purposes designated by the grantor if the purpose is specified as providing cash benefits to some or all of the participants, insured employees or annuitants of this fund or for reducing employer or employee costs; or, if no purposes are designated, then for the purpose of distribution to the several accounts and reserves of the Wisconsin retirement system at the end of the year as if the money or property were investment earnings of the fixed annuity division.

(i) May determine that some or all of the disability annuities and death benefits provided from the Wisconsin retirement system shall instead be provided through group insurance plans to be established by the group insurance board either as separate plans or as integral parts of the group life and income continuation insurance plans established under this chapter.

(j) Shall accept timely appeals from determinations made by the department, other than appeals of determinations made by the department regarding disability annuities. The board shall review the relevant facts and may hold a hearing. Upon completion of its review and hearing, if any, the board shall make a determination which it shall certify to the participating employer or the appropriate state agency and to the appropriate employee, if any. The board's determination of an employee's status under s. 40.06 (1) (e) shall remain in effect until receipt by the department of notification indicating a different classification. A participant may appeal that determination as provided by s. 40.06 (1) (e).

(k) May require any employer to distribute to its employees any materials which are determined to be necessary for the efficient administration of the fund.

(L) May delegate powers and duties as deemed necessary or desirable.

(m) Shall approve or reject all administrative rules proposed by the secretary under sub. (2) (i).

(n) May allow any separate retirement system for employees of one or more employers to deliver or send funds representing assets of that system to the department. If the department accepts delivery or transmission, the department shall purchase shares of the fixed retirement investment trust or variable retirement investment trust or both with those funds, subject to rules under sub.

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40.04 ACCOUNTS AND RESERVES.

(1) The separate accounts and reserves under subs. (2) to (10) and any additional accounts and reserves determined by the department to be useful in achieving the fund's purposes, or necessary to protect the interests of the participants or the future solvency of the fund, shall be maintained within the fund. The accounts and reserves maintained for each benefit plan shall fairly reflect the operations of that benefit plan. Any deficit occurring within the accounts of a benefit plan shall be eliminated as soon as feasible by increasing the premiums, contributions or other charges applicable to that benefit plan. Until eliminated, any deficit shall be charged with interest at the rate the funds would have earned if there had been no deficit.

(2) (a) An administrative account shall be maintained within the fund from which administrative costs of the department shall be paid, except charges for services performed by the investment board, costs of medical and vocational evaluations used in determinations of eligibility for benefits under ss. 40.61, 40.63 and 40.65 and costs of contracting for insurance data collection and analysis services under s. 40.03 (6) (j).

(b) Except as otherwise provided in this section, investment income of this fund and moneys received for services performed or to be performed by the department shall be credited to this account.

(c) The secretary shall estimate the administrative costs to be incurred by the department in each fiscal year and shall also estimate the investment income which will be credited to this account in the fiscal year. The estimated administrative costs less the estimated investment income shall be equitably allocated by the secretary, with due consideration being given to the derivation and amount of the investment income, to the several benefit plans administered by the department. In determining the amount of the allocation, adjustments shall be made for any difference in prior years between the actual administrative costs and investment income from that originally estimated under this paragraph. An amount equal to the adjusted allocated costs shall be transferred to this account from the investment earnings credited to the respective benefit plan accounts and from payments by the respective insurers or employee-funded reimbursement plan providers for administrative services.

(d) The costs of investing the assets of the benefit plans and retirement systems, including all costs due to s. 40.03 (1) (n), shall be paid from the appropriation under s. 20.515 (1) (r) and charged directly against the appropriate investment income or reserve accounts of the benefit plan or retirement system receiving the services.

(e) The costs of contracting for insurance data collection and analysis services under s. 40.03 (6) (j) shall be paid from the appropriation under s. 20.515 (1) (ut).

(3) A fixed retirement investment trust and a variable retirement investment trust shall be maintained within the fund under the jurisdiction and management of the investment board for the purpose of managing the investments of the retirement reserve accounts and of any other accounts of the fund as determined by the board, including the accounts of separate retirement systems. Within the fixed retirement investment trust there shall be maintained a transaction amortization account and a market recognition account, and any other accounts as are established by the board or the investment board. A current income account shall be maintained in the variable retirement investment trust. All costs of owning,

operating, protecting and acquiring property in which either trust has an interest shall be charged to the current income or market recognition account of the trust having the interest in the property.

(a) The net gain or loss of the variable retirement investment trust shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the respective trust bears to the total average daily balance of all participating accounts in the trust. The amount to be distributed shall be the excess of the increase within the period in the value of the assets of the trust resulting from income from the investments of the trust and from the sale or appreciation in value of any investment of the trust, over the decrease within the period in the value of the assets resulting from the sale or the depreciation in value of any investments of the trust.

(ab) Beginning on December 31, 2000, the balance of the transaction amortization account shall be determined and 20% of the balance established on December 31, 2000, shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the fixed retirement investment trust bears to the total average daily balance of all participating accounts in the trust until the balance of the transaction amortization account is entirely distributed. Notwithstanding sub. (3) (intro.), after the entire balance of the transaction amortization account has been distributed, the department shall close the account.

(am) 1. Beginning on January 1, 2000, there shall be maintained within the fixed retirement investment trust a market recognition account. The department shall establish and administer the market recognition account as recommended by the actuary or actuarial firm retained under s. 40.03 (1) (d) and as approved by the board.

2. Annually, the total market value

investment return earned by the fixed retirement investment trust during the year shall be credited to the market recognition account.

3. Annually, on December 31, the sum of all of the following shall be distributed from the market recognition account to each participating account in the fixed retirement investment trust in the same ratio as each account's average daily balance bears to the total average daily balance of all participating accounts in the trust:

a. The expected amount of investment return in the fixed retirement investment trust during the year based on the assumed rate.

b. An amount equal to 20% of the difference between the total market value investment return earned by the fixed retirement investment trust and the expected amount of investment return of the fixed retirement investment trust during the year ending on December 31 based on the assumed rate.

c. An amount equal to 20% of the sum of the differences between the total market value investment return earned by the fixed retirement investment trust and the expected amount of investment return of the fixed retirement investment trust at the end of the 4 preceding years.

For the purpose of making this calculation, the amount in the market recognition account at the end of each year that occurs before the year 2000 shall be assumed to be zero.

(b) The assets of the fixed retirement investment trust shall be commingled and the assets of the variable retirement investment trust shall be commingled. No particular contributing benefit plan shall have any right in any specific item of cash, investment or other property in either trust other than an undivided interest in the whole as provided in this paragraph. The department of administration shall maintain any records as may be required to account for each contributing account's share in the corresponding trust except that the employee accumulation reserve, the employer accumulation reserve and the annuity reserve shall be treated as a single account, except as provided in sub. (7).

(c) The department shall advise the investment board and the state treasurer as to the limitations on the amounts of cash to be invested from investment trusts under this subsection in order to maintain the cash balances deemed advisable to meet current annuity, benefit and expense requirements.

(d) Notwithstanding par. (a), assets of the fixed retirement investment trust which are authorized to be invested in common or preferred stock may, if authorized by rule, be invested as a part of the variable retirement investment trust with that portion of the annual distributions of net gains or losses to the fixed retirement investment trust from the variable retirement investment trust being credited to the market recognition account.

(4) **(a)** An employee accumulation reserve, within which a separate account shall be maintained for each participant, shall be maintained within the fund and:

1. Credited with all employee contributions made under s. 40.05 (1), all employer

additional contributions made under s. 40.05 (2) (g) 1., all additional contributions under s. 40.05 (2) (g) 2. and all contribution accumulations reestablished under s. 40.26 or 40.63 (10).

2. Credited as of each December 31 with interest on the prior year's closing balance at the effective rate on all employee required contribution accumulations in the variable annuity division, on all employee required contributions in the fixed annuity division on December 31, 1984, on all employee required contributions in the fixed annuity division of participants who are not participating employees after December 31, 1984, and on all employee and employer additional contribution accumulations and with interest on the prior year's closing balance at the assumed benefit rate on all employee required contribution accumulations in the fixed annuity division for participants who are participating employees after December 31, 1984, but who terminated covered employment before December 30, 1999.

2g. Credited as of each December 31, with interest on the prior year's closing balance at the effective rate on all employee required contribution accumulations in the fixed annuity division for participants who are participating employees on or after December 30, 1999.

2m. Debited, if a participant terminates covered employment on or after January

1, 1990, but before December 30, 1999, and applies for a benefit under s. 40.25 (2), with an amount equal to the amount by which the fixed annuity division interest credited on or after January 1, 1990, but before December 30, 1999, to employee required contributions, exceeds the interest crediting at an annual rate of 3% on each prior year's closing balance.

3. Debited by the amount available in any participant's account for funding a benefit elected by the participant or the participant's beneficiary. When the amount available has been applied to funding the benefit, no further right to the amounts, or to corresponding creditable service and employer contribution accumulations, shall exist other than the right to the annuity or benefit so granted except as provided in s. 40.26 or 40.63 (10).

(b) Whenever a payment under s. 40.25 (4), an annuity or a death benefit is computed, the prior year's closing balance of all employee contribution accumulations and any accounts maintained for individual participants shall be credited with interest for each full month elapsing between the first day of the calendar year and the annuity effective date or the month in which the payment of a benefit under s. 40.25 (4) is approved at one-twelfth of the assumed benefit rate. The interest so credited shall be charged to the

interest earnings for the current year and shall be paid out or transferred with the amount to which it was so credited.

(bm) Whenever a payment under s. 40.25 (1) is computed under s. 40.23 (3), the prior year's closing balance of all employee and employer contribution accumulations and any accounts maintained for individual participants shall be credited with interest for each full month elapsing between the first day of the calendar year and the month in which the payment under s. 40.25 (1) is approved at one-twelfth of the assumed benefit rate. The interest so credited shall be charged to the interest earnings for the current year and shall be paid out or transferred with the amount to which it was so credited.

(c) Whenever a participant's account is reestablished under s. 40.26 (2) or 40.63 (10), in lieu of interest credits as provided in par. (a), any balances remaining in the account at the end of the calendar year in which reestablished shall be credited with interest at one-twelfth the assumed benefit rate for the year for each full month between the date the account was reestablished and the end of the calendar year.

(5) An employer accumulation reserve shall be maintained within the fund to which, without regard to the identity of the individual employer, shall be:

(a) Credited all employer required contributions.

(b) Credited, as of each December 31, all fixed annuity division interest not credited to other accounts and reserves under this section.

(c) Debited the aggregate excess of the amount of each single sum benefit or in the case of an annuity the present value of the annuity over the amount equal to the accumulated credits of the participant in the employee accumulation reserve applied to provide for the benefit or annuity.

(d) Credited as of the date of termination of any annuity under s. 40.26 or 40.63 (9) (c) with the excess of the then present value of the terminated annuity over the aggregate amount of credits reestablished in the accounts of the participant.

(e) Credited all amounts waived, released or forfeited under any provision of this chapter.

(6) An annuity reserve shall be maintained within the fund to which shall be transferred amounts equal to the present value as of the date of commencement of annuities granted under this chapter. The reserve shall be increased by investment earnings at the effective rate and shall be reduced by the aggregate amount of annuity payments and death benefits paid with respect to the annuities and by the present value at the date of termination of annuities terminated in accordance with s. 40.08 (3), 40.26 or 40.63 (9) (c).

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40.05 CONTRIBUTIONS AND PREMIUMS.

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(2) Employer retirement contributions. For Wisconsin retirement system purposes and subject to the annual compensation limits under 26 USC 401 (a) (17) for a participating employee who first becomes a participating employee on or after January 1, 1996:

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(b) Contributions shall be made by each participating employer for unfunded prior service liability in a percentage of the earnings of each participating employee. A separate percentage rate shall be determined for the employee occupational categories under s. 40.23 (2m) as of the employer's effective date of participation. The rates shall be sufficient to amortize as a level percent of payroll over a period of 40 years from the later of that date or January 1, 1986, the unfunded prior service liability for the categories of employees of each employer determined under s. 40.05 (2) (b), 1981 stats., increased to reflect any creditable prior service granted on or after January 1, 1986, increased to reflect the effect of 1983 Wisconsin Act 141, increased at the end of each calendar year after January 1, 1986, by interest at the assumed rate on the unpaid balance at the end of the year and adjusted under pars. (bu), (bv) and (bw).

(bg) Contributions of amounts under par. (b) may be made in advance to reduce an employer's existing unfunded prior service liability.

(bm) Contributions under par. (b) for each category of employee shall be made until full payment of that employer's unfunded prior service liability for all categories is made.

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(2m) Benefit adjustment contribution. Except as provided in sub. (2n), in addition to the amounts under subs. (1) and (2), a benefit adjustment contribution equal to 1% of earnings shall be paid by or for participating employees whose formula rate is determined under s. 40.23 (2m) (e) 1. and 3. This contribution shall be deducted from each payment of earnings to participating employees unless the employer provides through its compensation provisions or agreements that all or part of the contribution will be paid by the employer. For benefit purposes, this contribution shall be treated as if it were an employer required contribution regardless of whether the employer or the employee pays the contribution and, for a participating employee who first becomes a participating employee on or after January 1, 1996, shall be subject to the annual compensation limits under 26 USC 401 (a) (17).

(2n) Contribution rate adjustment.

(a) If the board, on the advice of the actuary, determines that an increase or decrease in contribution rates is necessary for any annual period after 1989, the board, on the advice of the actuary, shall adjust contribution rates in the following manner:

1. One-half of the increase or decrease in contribution rates shall be provided for by an increase or decrease in employer contributions under sub. (2) (a) and (am), except as provided in subd. 3.

2. One-half of the increase or decrease in contribution rates shall be provided for by an increase or decrease in benefit adjustment contributions under sub. (2m), except as provided in subd. 3. or par. (b).

3. Any increase in contribution rates required after 1989 that results from benefit improvements under 1989 Wisconsin Act 13, which would otherwise increase employer contribution rates over the 1989 rate shall be provided for by an increase in benefit adjustment contributions under sub. (2m). Notwithstanding sub. (2m), an employer may not pay for all or part of any increase in benefit adjustment contributions that is required under this subdivision.

(b) If under par. (a) 2. a decrease in benefit adjustment contributions under sub. (2m) would reduce the amount under sub. (2m) to less than zero, the employee contribution rates under sub. (1) shall be decreased.

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40.19 RIGHTS PRESERVED.

(1) Rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

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40.23 RETIREMENT ANNUITIES.

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(2m) The following provisions apply only to participants who are participating employees after March 9, 1984:

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(b) Except as provided in s. 40.26, subject to the limitations under section 415 of the Internal Revenue Code, the initial amount of the normal form annuity shall be an amount equal to 70%, or 65% for participants whose formula rate is determined under par. (e) 3. or 85% for participants whose formula rate is determined under par. (e) 4., of the participant's final average earnings plus the amount which can be provided under pars. (c) and (d) or, if less, shall be in the monthly amount equal to the sum of the amounts determined under pars. (c), (d) and (e) as modified by par. (f) and in accordance with the actuarial tables in effect on the annuity effective date. If the participant has creditable service under both par. (e) 4. and another category under par. (e), the percent applied under this paragraph shall be determined by multiplying the percent that each type of creditable service is of the participant's total creditable service by 85% and 65% or 70%, respectively, and adding the results, except that the resulting benefit may not be less than the amount of the normal form annuity that could be paid based solely on the creditable service under par. (e) 4.

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(e) A monthly annuity in the normal form computed on the basis of the participant's final average earnings and creditable service, if the annuity becomes effective on or after the normal retirement date of the participant, determined by multiplying the participant's final average earnings by the participant's creditable service and the following applicable percentage:

1. For each participant for creditable service of a type not otherwise specified in this paragraph that is performed before January 1, 2000, 1.765%; for such creditable service that is performed on or after January 1, 2000, 1.6%.

2. For each participant for creditable

service as an elected official or as an executive participating employee that is performed before January 1, 2000, 2.165%; for such creditable service that is performed on or after January 1, 2000, 2%.

3. For each participant subject to titles II and XVIII of the federal Social Security Act, for service as a protective occupation participant that is performed before January 1, 2000, 2.165%; for such creditable service that is performed on or after January 1, 2000, 2%.

4. For each participant not subject to titles II and XVIII of the federal Social Security Act, for service as a protective occupation participant that is performed before January 1, 2000, 2.665%; for such creditable service that is performed on or after January 1, 2000, 2.5%.

APPENDIX F

26 USCA § 401(a), provides in relevant part as follows:

> (a) Requirements for qualification.--A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section
>
> ***
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries ...

APPENDIX G

26 CFR § 1.401-2(a)(1)-(3) provides as follows:

§ 1.401-2 Impossibility of diversion under the trust instrument.

(a) In general. (1) Under section 401(a)(2) a trust is not qualified unless under the trust instrument it is impossible (in the taxable year and at any time thereafter before the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. This section does not apply to funds of the trust which are allocated to provide medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14. For the rules prohibiting diversion of such funds and the requirement of reversion to the employer after satisfaction of all liabilities under the medical benefits account, see paragraph (c)(4) and (5) of § 1.401-14. For rules permitting reversion to the employer of amounts held in a section 415 suspense account, see § 1.401(a)-2(b).

(2) As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

(3) As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

APPENDIX H

STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-0A

EMPLOYE TRUST FUNDS BOARD,
THE DEPARTMENT OF EMPLOYE TRUST
FUNDS and ERIC O. STANCHFIELD,
Secretary of the Department of Employe Trust Funds,

Petitioners,

v.

GEORGE LIGHTBOURN, Acting
Secretary of the Wisconsin, Department
of Administration, JACK C. VOIGHT,
Wisconsin State Treasurer,

Respondents.

PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION AND FOR LEAVE TO HAVE PETITION STAND AS A COMPLAINT SEEKING DECLARATORY JUDGMENT

WHYTE HIRSCHBOECK DUDEK SC

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Dated: December 23, 1999

Petitioners, by their attorneys, hereby petition the Wisconsin Supreme Court for leave to commence an original action, pursuant to Article VII, section 3 of the Wisconsin Constitution, section 809.70, Stats., section 27(4t) of 1999 Assembly Bill 495, and section 806.04, Stats., the Uniform Declaratory Judgment Act. Petitioners further request that the following allegations stand as their Complaint for Declaratory Judgment.

PRELIMINARY STATEMENT

1. This is a petition for leave to commence an original action in the Supreme Court. Petitioners administer the Wisconsin Retirement System ("WRS"). Chapter 40, Stats., creates a public employe trust fund ("Trust Fund"), which is operated under the direction of the Department of Employe Trust Funds ("ETF"). As fiduciaries of the Trust Fund, Petitioners' must protect the security of the Trust Fund and each participant's beneficial interest in the Trust Fund. 1999 Assembly Bill 495 has been signed by Wisconsin Governor Tommy Thompson and will become effective as 1999 Wis. Act 11 the day after its publication (hereinafter "AB 495"). AB 495 makes several changes to the WRS and the manner in which ETF will be required to administer the Trust Fund. Petitioners can only implement lawful changes to the WRS and the Trust Fund as part of their fiduciary duties. Petitioners have questions concerning the constitutionality of some of the provisions in AB 495 and questions concerning the correct interpretation and implementation of AB 495. For these reasons, and to fulfill their fiduciary duties to protect the security of the Trust Fund, Petitioners seek a declaratory judgment as to the constitutionality of portions of AB 495.

2. Petitioners also seek preliminary relief by issuance of a preliminary injunction or a writ of prohibition necessary in aid of the Supreme Court's jurisdiction, pursuant to Article VII, section 3(2) of the Wisconsin Constitution and section 751.07, Stats., enjoining and prohibiting Petitioners and Respondents from taking those actions directed by AB 495 and

AB 584, which has also been signed by Wisconsin Governor Tommy Thompson and will become effective as 1999 Wis. Act 12 the day after its publication (hereinafter "AB 584"), or otherwise implementing or enforcing AB 495 or AB 584, after they have become effective, until such time as the Supreme Court rules on the constitutionality of AB 495 and declares which of its provisions, if any, should be implemented and enforced.[1] Notwithstanding the foregoing, Petitioners request that they not be enjoined from taking such contingent and preparatory measures toward implementation of AB 495 as they deem appropriate in their discretion and consistent with their fiduciary and other duties and responsibilities for administering the terms of the Trust Fund so as to allow for the smoothest transition, and least amount of disruption to Trust Fund participants, should some or all of the provisions of AB 495 be declared valid.

PARTIES

3. Petitioner Employe Trust Funds Board (the "Board"), is a body of trustees which operates and administers the Trust Fund. The Board was created by Subchapter I of Chapter 40, Wis. Stats., with purposes, powers and duties defined in Chapter 40, Stats., and with its principle offices located at 801 W. Badger Rd, Madison, Wisconsin.

4. Petitioner ETF is an agency of the State of Wisconsin created by Chapter 15, Stats. ETF operates under the direction and supervision of the Board, pursuant to Chapter 40, Wis. Stats., and has a principle place of business at 801 W. Badger Road, Madison, Wisconsin.

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[1] One of the changes to the WRS made by AB 495 was to increase the value of death benefits provided to a beneficiary of a participating employe. An unintended effect of the death benefit change was that an estate, or any other unnatural person, could not be named the beneficiary for a participating employe. AB 584 corrects that unintended effect by permitting an estate or other unnatural person to be the beneficiary of a participating employe. Thus, AB 495 and AB 584 are treated hereafter as a package of legislation that together must be enjoined until the Supreme Court rules on the provisions of AB 495.

5. Petitioner Eric O. Stanchfield is the Secretary of ETF, with principle business address at 801 W. Badger Rd., Madison, Wisconsin. Petitioner Stanchfield is also a participant in the WRS.

6. Respondent Jack C. Voight is the Wisconsin State Treasurer, whose current address is 1 S. Pinckney Street, 5th Floor, Madison, Wisconsin.

7. Respondent George Lightbourn is the Acting Secretary of the Wisconsin Department of Administration whose current address is 101 East Wilson Street, 10th Floor, Madison, Wisconsin 53702.

JURISDICTION

8. There are currently approximately 454,000 participants in the WRS, including approximately 249,000 active employees, 101,000 annuitants and 104,000 inactive employees who remain participants in the WRS.

9. The State of Wisconsin was one of 1,194 different employers which, as of December 31, 1998, participated in the WRS. These employers included counties, cities, towns, villages, school districts, library districts, other governmental units and instrumentalities of two or more units of government created within the State of Wisconsin. See secs. 40.02(28) and 40.02(54), Stats.

10. Each of the 454,000 participants in the WRS and each of the 1,194 employers included in the WRS will be affected by the implementation of Act 495. Among other effects, AB 495 involves the transfer of $4 billion from a smoothing account within the Trust Fund for uses other than intended by the smoothing account. Moreover, approximately $647 million of the $4 billion being transferred from the smoothing account will be diverted to permit $200 million to be used for the benefit of employers for non-Trust Fund purposes. Furthermore, AB 495 removes the discretion expressly provided to the Board to set certain actuarial assumptions which are critical to the administration of the Trust Fund.

11. Original jurisdiction of the Supreme Court is appropriate because the case is of critical importance to the current approximately 454,000 WRS participants and all future WRS participants and warrants the exercise of jurisdiction publici juris. The issues raised in this petition are of such urgency that original jurisdiction of the Supreme Court is essential. As soon as AB 495 becomes effective, ETF will be required to take immediate steps toward its implementation. If implementation of AB 495 is not enjoined and original jurisdiction is not accepted by the Supreme Court, uncertainty as to the proper administration of the Trust Fund will continue and threaten retirement decisions by those WRS participants who have reached elective retirement age. Moreover, actions undertaken pursuant to AB 495 might require reversal, which would cause substantial hardship on WRS participants who received increased benefits and then were required to return pension funds that might have, in whole or in part, already been spent. In some instances, the death of participants may prevent any recovery by the Trust Fund.

12. The legislature has requested the Supreme Court to accept the original jurisdiction of any action relating to the implementation of AB 495. AB 495, section 27(4t) provides:

> REQUEST THAT SUPREME COURT TAKE ORIGINAL JURISDICTION. Considering the implementation of this act a matter of high public importance, the legislature requests that the supreme court take jurisdiction of any original action relating to the implementation of this act.

Furthermore, on information and belief, the executive branch, through Respondents, has agreed not to oppose acceptance of original jurisdiction by the Supreme Court.

STATEMENT OF ISSUES

13. The issues which require the Supreme Court's attention in the exercise of its original jurisdiction include the following:

(a) Whether the use of $647 million to create the $200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS:

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(b) Whether the change in assumptions of section 40.02(7), Stats., required by AB 495, sections 5 and 28(1), constitute an usurpation of the Board's discretion and,

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(c) Whether the recognition of $4 billion from the Transaction Amortization Account ("TAA")

for use other than a smoothing mechanism in contravention of the purpose of the TAA

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(d) Whether the inability of approximately 51,000 inactive WRS participants to share in the $4 billion TAA transfer and their receipt of reduced annuity dividends because of the TAA transfer

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(e) Whether increasing the formula multiplier used in calculating retirement benefits using the internal funding sources provided in AB 495, but excluding approximately 51,000 inactive WRS participants from the increase when they retire violates

the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

(f) Whether raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., using the internal funding sources provided in AB 495, but excluding protective occupation participants from sharing in the increase violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

THE WISCONSIN RETIREMENT SYSTEM

14. The WRS is a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan. The WRS is a defined benefit plan to the extent that its participants are ensured they will receive a specific retirement benefit calculated as a formula involving their final average monthly earnings multiplied by the years of creditable service. Different percentage multipliers are used for calculating the formula benefits to be paid to different groups of participating employees. The WRS is also a defined contribution plan to the extent that participating employees and employers pay a percentage of payroll as required contributions into the Trust Fund. Moreover, individual accounts are maintained for each non-annuitant participant, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated contributions plus an amount from the employer reserve equal to the participant's accumulated required contributions. Sections 40.05(1), 40.23(1)(a)(2m) and (3), Stats.

15. Within the Trust Fund, there is a fixed retirement investment trust ("FRIT"). Section 40.04(3), Stats. The FRIT receives funds from three sources: (1) contributions from participating employees; (2) contributions from participating employers; and (3) investment earnings on the employee and employer contributions.

16. There are a number of accounts within the FRIT, four of which are significant to this proceeding. First, there is

an employee accumulation reserve account, which holds funds related to employee contributions. Section 40.04(4), Stats. Second, there is an employer accumulation reserve account, which holds funds related to employer contributions. Section 40.04(5), Stats. Third, there is an annuity reserve account, which holds funds sufficient to make annuity payments to those retiring public employees who receive their retirement benefits on an installment basis. Section 40.04(6), Stats. When an employee retires and elects to take an annuity, the employee and employer accumulation reserves transfer to the annuity reserve an amount equal to the present value of the annuity. Section 40.04(6), Stats. Fourth, there is the TAA. Section 40.04(3), Stats.

17. Within the employee accumulation reserve in the FRIT, each participant of the WRS has a separate account maintained. Section 40.04(4)(a), Stats. In contrast, the employer accumulation reserve within the FRIT is maintained without regard to the identity of any individual employer. Section 40.04(5), Stats. The sole purpose of the employer accumulation reserve is to fund benefits to WRS participants and their beneficiaries. Employers do not have vested interests in any WRS funds. The money in the employer accumulation reserve is dedicated solely to provide for the retirement benefits of WRS participants. Section 40.04(5)(c), Stats. WRS participants and their beneficiaries have a direct property and contractual beneficial interest in the funds maintained in the employer accumulation reserve within the FRIT.

18. In addition to the annually required employer contributions, employers are required to pay contributions for any unfunded prior service liability that is owed to the WRS as a result of past benefit improvements under the WRS that were not fully funded at the time of their creation and of recognizing prior service earned by employees before the employer became a covered employer under the WRS. Employer contribution rates for the payment of unfunded prior service liability are currently amortized over 40 years. In other words, employers make payments to the WRS for the unfunded prior service liability debt employers owe to the WRS. Section 40.05(2)(b), Stats. The employer must continue to make contributions

toward the employer's unfunded prior service liability until the entire debt has been paid to the WRS. Section 40.05(2)(bm), Stats.

19. The TAA is an accounting mechanism which allows the three reserve accounts to spread over time the recognition of gain or loss on investments, thereby partially insulating WRS participants from the fluctuations of the investment marketplace. The purpose of the TAA is to smooth fluctuations in marketplace investment gains and losses and not to pay gains or debit losses to any particular WRS participant or groups of participants. The TAA is an accounting mechanism to improve equity among WRS participants in the effect of the investment gains and losses on their retirement accounts. Its purpose was described in the Report of Joint Survey Committee on Retirement Systems, Appendix to 1973 Senate Bill 449, as follows:

> Under [the law before enactment of the TAA] each realized capital gain or loss of a fixed annuity retirement fund is reflected fully in the investment experience for the year in which the gain or loss is realized. This results in several significant problems:
>
> a. The investment board may well feel restrained from disposing of a specific holding at a current loss, despite the fact that the proceeds from the disposition could be reinvested so as to recover the loss, achieve a higher rate of current return, and in total produce a net advantage for the retirement fund.

> b. Individual employees who terminate their employment or die following a year in which the retirement fund experienced extreme net capital gains or losses will suffer an unwarranted increase or decrease in the value of their retirement accounts. While exact individual equity is hard to achieve in any group enterprise such as a retirement program, this is one area in which improved equity can be achieved.
>
> Under this bill every capital gain or loss realized under the fixed annuity investment trust would be credited (or debited) to a special holding account, the proceeds of which would be paid out to the several retirement funds or systems at 7% [now 20%] each year. Thus each capital gain or loss would be spread over a period of about 14 years [now 5 years] rather than falling in total in one year. (Emphasis added.)

20. Every year, each of the FRIT's three reserve accounts is credited proportionally with 20% of the TAA balance. Section 40.04(3)(a), Stats.

21. Respondent Voight is the treasurer of the Trust Fund. Section 40.03(4), Stats.

22. The Board is expressly responsible for, and authorized to, select and retain the actuary and actuarial firm which shall perform all actuarial services necessary for the operation and control of the Trust Fund. Section 40.03(1)(d),

Stats. The Board alone is authorized to approve the contribution rates and actuarial assumptions determined by the actuary, expressly including the assumed interest rate and the assumptions for future changes in employee salary rates. Section 40.03(1)(e), Stats. It is these actuarial assumptions that determine employee and employer contributions to the Trust Fund and, accordingly, the actuarial assumptions must be based on the actual experience of the WRS as identified by the actuary. Section 40.03(5)(b), Stats.

23. The monies held in the Trust Fund are not state funds. Trust Fund money has been irrevocably placed in trust for the benefit of WRS participants and the State cannot direct the use of such money for non-Trust purposes.

PRINCIPLES PROTECTING THE WRS

24. WRS participants have a property and contractual right in "the proper use of the earnings" in the Trust Fund. Ass'n of State Prosecutors v. Milwaukee Cty., 199 Wis. 2d 549, 559, 544 N.W.2d 888 (1996). The "legislature ... [is] not free to spend or appropriate the earnings of the fund except in a manner authorized by statute ...." Id.

25. "The WRS's ability to meet its obligations can be jeopardized where funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the [Trust Fund's] monies as broadly as possible. Id. at 560. "Government takings do not become exempt from due process requirements simply because they may be actuarially insignificant. Id. at 561. While the specific transfer of Trust Funds ... may not immediately threaten the benefits of vested [WRS] beneficiaries, the precedent set by such a transfer certainly could." Id. at 562.

26. Even though a change to the WRS constitutes a taking of a property interest, the "legislature should retain a limited power to adjust or amend [the WRS] in certain situations, such as when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds. Id. at 563 (emphasis added). In short, in such circumstances legislative intervention [must] be needed. Id. at 564. It is not

enough that legislative intervention in the WRS not create actuarial unsoundness or even be deemed to be actuarially sound. Intervention that causes a taking must instead be "needed" and "necessary to protect actuarial soundness. Id. at 563-64.

27. Where an exclusive grant of discretionary authority has been given statutorily to the ETF Board, WRS participants have a property interest in the preservation of the Board's authority. Retired Teachers Ass'n. v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 558 N.W.2d 83 (1997). WRS participants have a property right in the investment earnings of the Trust Fund and a property right to have those investment earnings distributed in the manner set by statute. Id. at 23-25.

CHANGES TO THE WRS MADE BY AB 495

28. AB 495 was introduced in the Assembly on October 1, 1999. On October 6, 1999, Assembly Amendment 3 was proposed, which provided:

> NONSEVERABILITY. Notwithstanding section 990.001(11) of the statutes, if a court finds that any provision of this act is unconstitutional, the entire act is void.

Assembly Amendment 3 was rejected on October 6, 1999. AB 495 was passed in both the Assembly and the Senate on October 6, 1999, just five days after it had been introduced.

29. AB 495 provides that, on December 31, 1999, $4,000,000,000 is to be distributed from the TAA to the employer, employee and annuity reserve accounts in the FRIT in an amount equal to the percentage of the total distribution determined by dividing each reserve's account balance on the prior January 1 by the total balance of the FRIT on the prior January 1. The amount received by the employee reserve account is to be divided among each participant's account's balance. AB 495, section 27(1)(a).

30. The early recognition of $4 billion from the TAA is not to serve the smoothing purpose for which the TAA exists. Instead, it is to serve as an internal funding mechanism for benefits created by AB 495 and for benefits expressly provided to employers, who do not have beneficial interests in the Trust Fund, including the TAA.

31. Currently, when a participant in the WRS terminates covered employment and becomes eligible for a retirement annuity, one of the ways in which the amount of his or her annuity is determined is by multiplying the participant's final average earnings by the participant's years of creditable service and by a percentage multiplier. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is 2%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is 2.5%. For all other participants in the WRS, the percentage multiplier is 1.6%. Sections 40.23(2m)(e)1, 2, 3 and 4, Stats.

32. AB 495 increases the percentage multiplier for all classes of participants in the WRS for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased to 2.665%. For all other participants in the WRS, the percentage multiplier is increased to 1.765%. The increase in the percentage multiplier first applies to the calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service that is performed on or after January 1, 2000, however, AB 495 provides that the current law percentage multiplier will apply. AB 495, sections 17, 18, 19 and 20.

33. The result of transferring $4 billion from the TAA to fund, in part, benefits resulting from an increase in multiplier applied to services prior to January 1, 2000, means

that the $4 billion will not be shared equitably by WRS participants. Those participants with longer creditable service as of January 1, 2000, will receive more of the $4 billion by the formula increase. That result is directly contrary to the purpose of the TAA, which was to increase individual equitable sharing in interest gains generated in the Trust Fund through the smoothing mechanism of the TAA rather than to have investment earnings concentrated in any one year, which is the result of the $4 billion TAA transfer.

34. There are approximately 104,000 current WRS participants who will not be active employees on January 1, 2000. Under AB 495, approximately 51,000 of these inactive, but current WRS participants will not be entitled to have the formula increases applied to their pre-January 1, 2000 creditable service when they retire. AB 495, section 28(2).

35. Individual accounts in the employee accumulation reserve are credited with earnings based upon the effective rate, which includes investment earnings for the calendar year. Section 40.02(23)(a), Stats. The $4 billion TAA transfer provides that it is to be credited "to participants' accounts based on their account balances as of January 1, 1999, pursuant to section 40.04(4)(a)2. and 2g. of the statutes." AB 495, section 27(1)(c). Section 40.04(4)(a)2., Stats., provides that some inactive WRS participants are to be credited with interest at the assumed rate of 5% rather than at the effective rate. Accordingly, because the investment earnings used to calculate the effective rate for the 1999 calendar year includes the $4 billion of earnings distributed from the TAA under AB 495, certain inactive WRS participants will not receive any of the $4 billion. Moreover, when such an inactive WRS participant retires, his or her subsequent annuity account dividends will be reduced because the TAA will have been reduced by $4 billion. In addition to the loss of all WRS participants in having the $4 billion taken from the TAA and used for purposes contrary to the smoothing and equitable earnings distribution intent of the TAA, those inactive participants will have incurred a direct loss by the TAA transfer.

36. There are approximately 51,000 inactive WRS participants who are credited with interest at the assumed rate of 5% annually rather than at the effective rate and who will retire rather than electing to take a separation benefit or die before reaching retirement age.

37. AB 495 eliminates the TAA over a five year period and replaces it with another accounting mechanism known as a market recognition account ("MRA") that is to be used for distributing the total market value investment returns earned by the FRIT. The MRA serves a smoothing purpose as did the TAA but it distributes investment earnings and losses in a manner more directly related to market effects. The total amount of the TAA is frozen and distributed over five years. The only exception is that before freezing the TAA, the $4 billion is transferred out for internal funding of benefits provided under AB 495, including benefits to employers for non-Trust Fund purposes. See AB 495, sections 8 and 9.

38. The purpose of changing the smoothing, accounting mechanism from the TAA to the MRA is to distribute Trust Fund investment earnings and losses on a schedule more consistent with market cycles. This can, and will, be achieved through the phase-out of the TAA and transition to the MRA, which is a proper trust purpose and consistent with the smoothing flexibility necessary for Trust Fund investment distributions. That all can be accomplished, however, without first making a one-time, $4 billion transfer from the TAA to internally fund benefits.

39. The following charts demonstrate the manner in which the TAA would be distributed as of December 31, 1999, assuming a $15 billion TAA balance, under current law, under AB 495, and under AB 495 with a transition to the MRA but without the $4 billion transfer.

TAA DISTRIBUTION SCENARIOS ASSUMING $15 BILLION TAA AS OF DECEMBER 31, 1999

(billion $)[2]
Current Law

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.0	12.00	9.60	7.68	6.14	4.91
20% Annual Distribution	3.00	2.40	1.92	1.54	1.23	0.98
One-Time Distribution	0.00					
TAA Phase-Out	0.00					
Ending Balance	12.00	9.60	7.68	6.14	4.91	3.93

[2]Example assures no future gains or losses after 1999.

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	8.00	6.40	4.80	3.20	1.60
20% Annual Distribution	3.00					
One-Time Distribution	4.00					
TAA Phase-Out	0.00	1.60	1.60	1.60	1.60	1.60
Ending Balance	8.00	6.40	4.80	3.20	1.60	0.00

5 Year Transition to MRA Without any One-Time Recognition

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	12.00	9.60	7.20	4.80	2.40
20% Annual Distribution	3.00					
One-Time Distribution	0.00					
TAA Phase-Out	0.00	2.40	2.40	2.40	2.40	2.40
Ending Balance	12.00	9.60	7.20	4.80	2.40	0.00

40. The transition from the TAA to the MRA without the $4 billion transfer from the TAA smoothes, and reduces, the adverse impact on participants to a much greater extent than the $4 billion transfer, which only serves to greatly exacerbate inequities in the sharing of the $4 billion.

41. As part of the $4 billion TAA transfer, approximately $647 million was used to make a direct payment to employers of Trust Fund monies. AB 495 directs that $200 million of the amount deposited into the employer accumulation reserve be diverted to an employer credit account. To achieve that $200 million deposit into an employer credit account, the legislature reverse engineered the amount of money that would have to be deposited into all three accounts to generate the $200 million employer credit account. The amount required to generate the $200 million employer credit is approximately $647 million.

42. The funds in the employer accumulation reserve are for the exclusive purpose of paying participant benefits. Section 40.04(5)(c), Stats. The $200 million employer credit account nominally created within the employer accumulation reserve by AB 495 is used to pay the unfunded prior service liability debt owed by employers to the WRS. To the extent any employer does not have such a debt to the WRS, the employer is credited out of the $200 million employer reserve credit account for employer required contributions to the WRS in future years. AB 495, section 27(1)(b).

43. The employer credit account of $200 million is a diversion of $200 million of Trust Fund monies, in which WRS participants have a protected property and contract right. The $200 million is given to employers, who have no right or entitlement to the money, so that the employers can use the money to pay either their unfunded prior service liability debt or future contribution debts to the Trust Fund. To the extent employers have an unfunded liability debt owed to the Trust Fund, $200 million of Trust Fund monies are being used to pay that debt owed to the Trust Fund. To the extent employers have required contributions as determined by the Board and actuary, those contribution debts are being paid from the $200 million Trust Fund monies.

44. Under current law, employee and employer contributions to the fund are based on certain assumed interest rates and assumed salary increases. The assumed interest rate set by statute is 7.5% and the assumed salary increases are set at 1.9% less than the assumed rate. Section 40.02(7), Stats. The Board may approve different rates based on the recommendations of the actuary designated by the Board. Id.

45. AB 495 increases the assumed interest rate to 8% and increases the differences between the assumed salary increases and the assumed interest rate to 3.4%. Although AB 495 leaves in place the ability of the Board, on recommendation by the actuary, to approve a different rate "due to changed economic circumstances," it directs that the new assumptions be used "for the 2001 calendar year." AB 495, sections 5 and 28(1). Thus, the discretion of the Board, based on the

recommendation of the actuary, has been limited by AB 495 because the ability to choose different rates is limited in time to after the 2001 calendar year and even then only until changed economic circumstances could be used to again invest discretion within the Board. The increase in the spread between assumed salary increases and the assumed interest rate serves to decrease the amount of contributions made to the Trust Fund. The actuary did not recommend these assumption changes to the Board and the Board did not approve them.

46. The maximum amount of an initial annuity for a WRS participant who receives an annuity that is calculated using the formula multiplier, other than a protective occupation participant, is increased by 5% of the participant's final average earnings. Section 40.23(2m)(b), Stats.; AB 495, section 16.

47. As of December 31, 1998, 17,609 active WRS participants were protective occupation participants.

POSITION OF PETITIONERS

48. The use of $647 million to create the $200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS is not a proper use of Trust Fund investment earnings. The use of the $647 million to establish the $200 million employer credit account violates section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

49. The changes in assumptions of section 40.02(7), Stats., required by AB 495, section 5, constitute an usurpation of the Board's discretion and, accordingly, violates section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of

U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

50. The recognition of $4 billion from the TAA for use other than a smoothing mechanism in contravention of the purpose of the TAA is a violation of section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

51. Approximately 51,000 inactive WRS participants do not share in the $4 billion and will receive reduced annuity dividends because of the transfer of the $4 billion from the TAA. This circumstance is a violation of section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

52. The transition from the TAA accounting smoothing mechanism to the MRA accounting smoothing mechanism by freezing the full amount of the TAA, without the $4 billion transfer, would be a permitted legislative action under section 40.19(1), Stats., because it would exchange the vested benefit rights of WRS participants in the TAA with equal or greater benefits in the MRA, which is a proper trust investment smoothing device. Moreover, under the transition from the TAA to the MRA without the $4 billion transfer from the TAA, the entire remaining balance of the TAA at the end of 1999 will be recognized over five years and available to be applied to contribution rates or benefit changes, including those created by AB 495.

53. The $4 billion TAA transfer, the changes in assumed interest and salary rates and the $647 million transfer used to create the $200 million employer credit account were not needed or necessary to preserve actuarial soundness of the

Trust Fund or to salvage the Trust Fund, because it is not financially troubled.

54. The actuary's report provided to the legislature did not recommend an early recognition from the TAA. The actuary report did comment approvingly on transition from the TAA to the MRA. A copy of the Wisconsin Retirement System Actuarial Valuations of Alternate Benefit and Financing Provision, prepared for the Senate Committee on Organization, July, 1999, is attached hereto as Exhibit A.

55. Raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., but excluding protective occupation participants from the increase raises the question of whether their exclusion violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

56. Increasing the formula multiplier for creditable service prior to January 1, 2000 and using the internal funding provided in AB 495 but excluding approximately 51,000 WRS participants who are inactive on January 1, 2000 from receiving the increases for their prior creditable service raises the question of whether their exclusion violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

REQUEST FOR RELIEF

WHEREFORE, Petitioners request that the Supreme Court declare the rights of WRS participants with regard to AB 495, as follows:

1. Declare AB 495, section 27(1)(B) unconstitutional to the extent that it transfers $647 million from the TAA for purposes of creating the $200 million employer credit account;

2. Declare AB 495, section 5 unconstitutional to the extent that it changes the assumed rates set forth in section 40.02(7), Stats.;

3. Declare AB 495, section 27(1)(a) unconstitutional to the extent that it directs a $4 billion transfer from the TAA the accounts and reserves of the FRIT;

4. Declare whether raising the final average earnings cap by 5% using the internal funding sources provided in AB 495 but excluding protective occupation participants from the increase violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

5. Declare whether increasing the formula multiplier for creditable service prior to January 1,2000 using the internal funding sources provided in AB 495 but excluding approximately 51,000 WRS participants who are inactive on January 1, 2000 from receiving the increase for their prior creditable service violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

6. Declare that the transition from the TAA to the MRA under the terms of AB 495, sections 8 and 9, to be a proper exercise of legislative authority under section 40.19(1), Stats., but without the $4 billion transfer;

7. Sever those portions of AB 495 declared to be unconstitutional from the remaining portions of AB 495, the result of which will be that any remaining provisions will be funded by the proper transition of investment smoothing mechanisms from the TAA to the MRA and, if necessary, by future employer and employee contributions; and

8. Provide such other legal and equitable relief as is appropriate.

Dated this 23rd day of December, 1999.

WHYTE HIRSCHBOECK DUDEK SC

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APPENDIX I

STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA

EMPLOYE TRUST FUNDS BOARD, THE DEPARTMENT OF EMPLOYE TRUST FUNDS, and ERIC O. STANCHFIELD, Secretary of the Department of Employe Trust Funds,

Petitioners,

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC., JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST, and STEVEN URSO,

Proposed Intervening Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, JACK C. VOIGHT, Wisconsin State Treasurer,

Respondents,

WISCONSIN EDUCATION ASSOCIATION COUNCIL, by its President TERRY CRANEY and its Vice-President, STAN JOHNSON, and DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN, and PHYLLIS POPE,

Intervening Respondents.

PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION AND FOR LEAVE TO HAVE PETITION STAND AS A COMPLAINT SEEKING DECLARATORY JUDGMENT

PARTIES

1. Petitioner Employe Trust Funds Board (the "Board"), is a body of trustees which operates and administers the Trust Fund. The Board was created by Subchapter I of Chapter 40, Wis. Stats., with purposes, powers and duties defined in Chapter 40, Stats., and with its principle offices located at 801 W. Badger Rd, Madison, Wisconsin.

2. Petitioner ETF is an agency of the State of Wisconsin created by Chapter 15, Stats. ETF operates under the direction and supervision of the Board, pursuant to Chapter 40, Wis. Stats., and has a principle place of business at 801 W. Badger Road, Madison, Wisconsin.

3. Petitioner Eric O. Stanchfield is the Secretary of ETF, with principle business address at 801 W. Badger Rd., Madison, Wisconsin. Petitioner Stanchfield is also a participant in the WRS.

4. Respondent Jack C. Voight is the Wisconsin State Treasurer, whose current address is 1 S. Pinckney Street, 5th Floor, Madison, Wisconsin.

5. Respondent George Lightbourn is the Acting Secretary of the Wisconsin Department of Administration whose current address is 101 East Wilson Street, 10th Floor, Madison, Wisconsin 53702.

6. Intervening Respondent Wisconsin Education Association Counsel ("WEAC") is an unincorporated professional labor association formed under the laws of the State of Wisconsin. Most of WEAC's members are participants or annuitants in the Wisconsin Retirement System ("WRS"). WEAC's principle offices are located at 33 Nob Hill Road,

Madison, Wisconsin.

7. Intervening Respondent Terry Craney is President of WEAC and, on information and belief, is a participant or annuitant in the WRS.

8. Intervening Respondent Steve Johnson is Vice-President of WEAC and, on information and belief, is a participant or annuitant in the WRS.

9. Intervening Respondents Donald Krahn, Margaret Guenther, Gerald Martin, and Phyllis Pope each are, on information and belief, participants or annuitants in the WRS.

10. Proposed Intervening Petitioners Wisconsin Professional Police Association, Inc. ("WPPA") is a Wisconsin non-stock corporation that is a professional labor and fraternal organization. Most of WPPA's 7,500 members are active and/or retired employees of county and municipal governments. Most of these members are working or retired law enforcement officers and either participants or annuitants of the WRS. Most of the WPPA's members meet the definition of "protective occupation participants" in WRS, pursuant to Wis. Stat. § 40.02(48).

11. Proposed Intervening Petitioner John Charewicz is a deputy sheriff employed by Portage County and meets the definition of "protective occupation participant" in WRS, pursuant to Wis. Stat. § 40.02(48). He is currently an active participant of the WRS.

12. Proposed Intervening Petitioner David J. Mahoney is a deputy sheriff employed by Dane County and meets the definition of "protective occupation participant" in WRS, pursuant to Wis. Stat. § 40.02(48). He is currently an active participant of the WRS.

13. Proposed Intervening Petitioner Susan Armagost is a police officer employed by the City of Madison and meets the definition of "protective occupation participant" in WRS,

pursuant to Wis. Stat. § 40.02(48). She is currently an active participant of the WRS.

14. Proposed Intervening Petitioner Steven Urso is a retired deputy sheriff of Dane County and meets the definition of "protective occupation participant" in WRS, pursuant to Wis. Stat. § 40.02(48).

15. Proposed Intervening Petitioners shall collectively be referred to herein as "WPPA".

JURISDICTION

16. There are currently approximately 454,000 participants in the WRS, including approximately 249,000 active employees, 101,000 annuitants and 104,000 inactive employees who remain participants in the WRS. Proposed Intervening Petitioners are among those participants.

17. Each of the 454,000 participants in the WRS, including Proposed Intervening Petitioners, will be affected by the implementation of Act 495. Among other effects, AB 495 involves the transfer of $4 billion from a smoothing account within the Trust Fund for uses other than intended by the smoothing account. Moreover, approximately $647 million of the $4 billion being transferred from the smoothing account will be diverted to permit $200 million to be used for the benefit of employers for non-Trust Fund purposes. Furthermore, AB 495 removes the discretion expressly provided to the Board to set certain actuarial assumptions which are critical to the administration of the Trust Fund.

18. Original jurisdiction of the Supreme Court is appropriate because the case is of critical importance to the current approximately 454,000 WRS participants and all future WRS participants and warrants the exercise of jurisdiction *public juris*. The issues raised in this petition are of such urgency that original jurisdiction of the Supreme Court is essential. As soon as AB 495 becomes effective, ETF will be required to take immediate steps toward its implementation. If implementation of AB 495 is not enjoined and original

jurisdiction is not accepted by the Supreme Court, uncertainty as to the proper administration of the Trust Fund will continue and threaten retirement decisions by those WRS participants who have reached elective retirement age. Moreover, actions undertaken pursuant to AB 495 might require reversal, which would cause substantial hardship on WRS participants who received increased benefits and then were required to return pension funds that might have, in whole or in part, already been spent.

19. The legislature has requested the Supreme Court to accept the original jurisdiction of any action relating to the implementation of AB 495. AB 495, section 27(4t) provides:

> REQUEST THAT SUPREME COURT TAKE ORIGINAL JURISDICTION. Considering the implementation of this act a matter of high public importance, the legislature requests that the supreme court take jurisdiction of any original action relating to the implementation of this act.

Furthermore, on information and belief, the executive branch, through Respondents, has agreed not to oppose acceptance of original jurisdiction by the Supreme Court.

20. The rights and property of Proposed Intervening Petitioners are affected by AB 495, and have a right under the Wisconsin Declaratory Judgment Act, Wis. Stat. § 806.04, to have determined by a court their questions of validity of AB 495 and to obtain a declaration of their rights and status thereunder.

STATEMENT OF ISSUES

21. The issues which require the Supreme Court's attention in the exercise of its original jurisdiction include the following:

(a) Whether the use of $647 million to create the $200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS:

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(b) Whether the change in assumptions of section 40.02(7), Stats., required by AB 495, sections 5 and 28(1), constitute an usurpation of the Board's discretion and,

(i) violates section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(c) Whether the recognition of $4 billion from the Transaction Amortization Account ("TAA") for use other than a smoothing mechanism in contravention of the purpose of the TAA

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(d) Whether the inability of approximately 51,000 inactive WRS participants to share in the $4 billion TAA transfer and their receipt of reduced annuity dividends because of the TAA transfer

(i) is a violation of section 40.19(1), Stats.;

(ii) is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and

(iii) constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

(e) Whether increasing the formula multiplier used in calculating retirement benefits using the internal funding sources provided in AB 495, but excluding approximately 51,000 inactive WRS participants from the increase when they retire violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

(f) Whether raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., using the internal funding sources provided in AB 495, but excluding protective occupation participants from sharing in the increase violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

THE WISCONSIN RETIREMENT SYSTEM

22. The WRS is a hybrid plan with characteristics of both a defined benefit plan and a defined contribution plan. The WRS is a defined benefit plan to the extent that its participants are ensured they will receive a specific retirement benefit calculated as a formula involving their final average monthly earnings multiplied by the years of creditable service. Different percentage multipliers are used for calculating the formula benefits to be paid to different groups of participating employees. The WRS is also a defined contribution plan to the extent that participating employees and employers pay a percentage of payroll as required contributions into the Trust Fund. Moreover, individual accounts are maintained for each non-annuitant participant, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated contributions plus an amount from the employer reserve equal to the participant's accumulated required contributions. Sections 40.05(1), 40.23(1)(a)(2m) and (3), Stats.

23. Within the Trust Fund, there is a fixed retirement investment trust ("FRIT"). Section 40.04(3), Stats. The FRIT receives funds from three sources: (1) contributions from participating employees; (2) contributions from participating employers; and (3) investment earnings on the employee and employer contributions.

24. There are a number of accounts within the FRIT, four of which are significant to this proceeding. First, there is an employee accumulation reserve account, which holds funds related to employee contributions. Section 40.04(4), Stats. Second, there is an employer accumulation reserve account,

which holds funds related to employer contributions. Section 40.04(5), Stats. Third, there is an annuity reserve account, which holds funds sufficient to make annuity payments to those retiring public employees who receive their retirement benefits on an installment basis. Section 40.04(6), Stats. When an employee retires and elects to take an annuity, the employee and employer accumulation reserves transfer to the annuity reserve an amount equal to the present value of the annuity. Section 40.04(6), Stats. Fourth, there is the TAA. Section 40.04(3), Stats.

25. Within the employee accumulation reserve in the FRIT, each participant of the WRS has a separate account maintained. Section 40.04(4)(a), Stats. In contrast, the employer accumulation reserve within the FRIT is maintained without regard to the identity of any individual employer. Section 40.04(5), Stats. The sole purpose of the employer accumulation reserve is to fund benefits to WRS participants and their beneficiaries. Employers do not have vested interests in any WRS funds. The money in the employer accumulation reserve is dedicated solely to provide for the retirement benefits of WRS participants. Section 40.04(5)(c), Stats. WRS participants and their beneficiaries have a direct property and contractual beneficial interest in the funds maintained in the employer accumulation reserve within the FRIT.

26. In addition to the annually required employer contributions, employers are required to pay contributions for any unfunded prior service liability that is owed to the WRS as a result of past benefit improvements under the WRS that were not fully funded at the time of their creation and of recognizing prior service earned by employees before the employer became a covered employer under the WRS. Employer contribution rates for the payment of unfunded prior service liability are currently amortized over 40 years. In other words, employers make payments to the WRS for the unfunded prior service liability debt employers owe to the WRS. Section 40.05(2)(b), Stats. The employer must continue to make contributions toward the employer's unfunded prior service liability until the entire debt has been paid to the WRS. Section 40.05(2)(bm), Stats.

27. The TAA is an accounting mechanism which allows the three reserve accounts to spread over time the recognition of gain or loss on investments, thereby partially insulating WRS participants from the fluctuations of the investment marketplace. The purpose of the TAA is to smooth fluctuations in marketplace investment gains and losses and not to pay gains or debit losses to any particular WRS participant or groups of participants. The TAA is an accounting mechanism to improve equity among WRS participants in the effect of the investment gains and losses on their retirement accounts. Its purpose was described in the Report of Joint Survey Committee on Retirement Systems, Appendix to 1973 Senate Bill 449, as follows:

> Under [the law before enactment of the TAA] each realized capital gain or loss of a fixed annuity retirement fund is reflected fully in the investment experience for the year in which the gain or loss is realized. This results in several significant problems:
>
> a. The investment board may well feel restrained from disposing of a specific holding at a current loss, despite the fact that the proceeds from the disposition could be reinvested so as to recover the loss, achieve a higher rate of current return, and in total produce a net advantage for the retirement fund.
>
> b. Individual employees who terminate their employment or die following a year in which the retirement fund experienced extreme net capital gains or

> losses will suffer an unwarranted increase or decrease in the value of their retirement accounts. While exact individual equity is hard to achieve in any group enterprise such as a retirement program, this is one area in which improved equity can be achieved.
>
> Under this bill every capital gain or loss realized under the fixed annuity investment trust would be credited (or debited) to a special holding account, the proceeds of which would be paid out to the several retirement funds or systems at 7% [now 20%] each year. Thus each capital gain or loss would be spread over a period of about 14 years [now 5 years] rather than falling in total in one year. (Emphasis added.)

28. Every year, each of the FRIT's three reserve accounts is credited proportionally with 20% of the TAA balance. Section 40.04(3)(a), Stats.

29. Respondent Voight is the treasurer of the Trust Fund. Section 40.03(4), Stats.

30. The Board is expressly responsible for, and authorized to, select and retain the actuary and actuarial firm which shall perform all actuarial services necessary for the operation and control of the Trust Fund. Section 40.03(1)(d), Stats. The Board alone is authorized to approve the contribution rates and actuarial assumptions determined by the actuary, expressly including the assumed interest rate and the assumptions for future changes in employee salary rates. Section 40.03(1)(e), Stats. It is these actuarial assumptions that

determine employee and employer contributions to the Trust Fund and, accordingly, the actuarial assumptions must be based on the actual experience of the WRS as identified by the actuary. Section 40.03(5)(b), Stats.

31. The monies held in the Trust Fund are not state funds. Trust Fund money has been irrevocably placed in trust for the benefit of WRS participants and the State cannot direct the use of such money for non-Trust purposes.

PRINCIPLES PROTECTING THE WRS

32. WRS participants have a property and contractual right in "the proper use of the earnings" in the Trust Fund. *Ass'n of State Prosecutors v. Milwaukee Cty.*, 199 Wis. 2d 549, 559, 544 N.W.2d 888 (1996). The "legislature ... [is] not free to spend or appropriate the earnings of the fund except in a manner authorized by statute ...." *Id.* 33. "The WRS's ability to meet its obligations can be jeopardized where funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the [Trust Fund's] monies as broadly as possible." *Id.* at 560. "Government takings do not become exempt from due process requirements simply because they may be actuarially insignificant." *Id.* at 561. "While the specific transfer of Trust Funds ... may not immediately threaten the benefits of vested [WRS] beneficiaries, the precedent set by such a transfer certainly could." *Id.* at 562.

34. Even though a change to the WRS constitutes a taking of a property interest, the "legislature should retain a limited power to adjust or amend [the WRS] in certain situations, such as when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." *Id.* at 563 (emphasis added). In short, in such circumstances "legislative intervention [must] be needed." *Id.* at 564. It is not enough that legislative intervention in the WRS not create actuarial unsoundness or even be deemed to be actuarially sound. Intervention that causes a taking must instead be "needed" and "necessary to protect actuarial soundness." *Id.* at 563-64.

35. Where an exclusive grant of discretionary authority has been given statutorily to the ETF Board, WRS participants have a property interest in the preservation of the Board's authority. *Retired Teachers Ass'n. v. The Employe Trust Funds Bd.*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997). WRS participants have a property right in the investment earnings of the Trust Fund and a property right to have those investment earnings distributed in the manner set by statute. *Id.* at 23-25.

CHANGES TO THE WRS MADE BY AB 495

36. AB 495 was introduced in the Assembly on October 1, 1999. On October 6, 1999, Assembly Amendment 3 was proposed, which provided:

> NONSEVERABILITY. Notwithstanding section 990.001(11) of the statutes, if a court finds that any provision of this act is unconstitutional, the entire act is void.

Assembly Amendment 3 was rejected on October 6, 1999. AB 495 was passed in both the Assembly and the Senate on October 6, 1999, just five days after it had been introduced.

37. AB 495 provides that, on December 31, 1999, $4,000,000,000 is to be distributed from the TAA to the employer, employee and annuity reserve accounts in the FRIT in an amount equal to the percentage of the total distribution determined by dividing each reserve's account balance on the prior January 1 by the total balance of the FRIT on the prior January 1. The amount received by the employee reserve account is to be divided among each participant's account's balance. AB 495, section 27(1)(a).

38. The early recognition of $4 billion from the TAA is not to serve the smoothing purpose for which the TAA exists. Instead, it is to serve as an internal funding mechanism for benefits created by AB 495 and for benefits expressly provided to employers, who do not have beneficial interests in the Trust

Fund, including the TAA.

39. Currently, when a participant in the WRS terminates covered employment and becomes eligible for a retirement annuity, one of the ways in which the amount of his or her annuity is determined is by multiplying the participant's final average earnings by the participant's years of creditable service and by a percentage multiplier. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is 2%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is 2.5%. For all other participants in the WRS, the percentage multiplier is 1.6%. Sections 40.23(2m)(e)1, 2, 3 and 4, Stats.

40. AB 495 increases the percentage multiplier for all classes of participants in the WRS for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased to 2.665%. For all other participants in the WRS, the percentage multiplier is increased to 1.765%. The increase in the percentage multiplier first applies to the calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service that is performed on or after January 1, 2000, however, AB 495 provides that the current law percentage multiplier will apply. AB 495, sections 17, 18, 19 and 20.

41. The result of transferring $4 billion from the TAA to fund, in part, benefits resulting from an increase in multiplier applied to services prior to January 1, 2000, means that the $4 billion will not be shared equitably by WRS participants. Those participants with longer creditable service as of January 1, 2000, will receive more of the $4 billion by the formula increase. That result is directly contrary to the purpose of the TAA, which was to increase individual equitable sharing

in interest gains generated in the Trust Fund through the smoothing mechanism of the TAA rather than to have investment earnings concentrated in any one year, which is the result of the $4 billion TAA transfer.

42. There are approximately 104,000 current WRS participants who will not be active employees on January 1, 2000. Under AB 495, approximately 51,000 of these inactive, but current WRS participants will not be entitled to have the formula increases applied to their pre-January 1, 2000 creditable service when they retire. AB 495, section 28(2).

43. Individual accounts in the employee accumulation reserve are credited with earnings based upon the effective rate, which includes investment earnings for the calendar year. Section 40.02(23)(a), Stats. The $4 billion TAA transfer provides that it is to be credited "to participants' accounts based on their account balances as of January 1, 1999, pursuant to section 40.04(4)(a)2. and 2g. of the statutes." AB 495, section 27(1)(c). Section 40.04(4)(a)2., Stats., provides that some inactive WRS participants are to be credited with interest at the assumed rate of 5% rather than at the effective rate. Accordingly, because the investment earnings used to calculate the effective rate for the 1999 calendar year includes the $4 billion of earnings distributed from the TAA under AB 495, certain inactive WRS participants will not receive any of the $4 billion. Moreover, when such an inactive WRS participant retires, his or her subsequent annuity account dividends will be reduced because the TAA will have been reduced by $4 billion. In addition to the loss of all WRS participants in having the $4 billion taken from the TAA and used for purposes contrary to the smoothing and equitable earnings distribution intent of the TAA, those inactive participants will have incurred a direct loss by the TAA transfer.

44. There are approximately 51,000 inactive WRS participants who are credited with interest at the assumed rate of 5% annually rather than at the effective rate and who will retire rather than electing to take a separation benefit or die before reaching retirement age.

45. AB 495 eliminates the TAA over a five year period and replaces it with another accounting mechanism known as a market recognition account ("MRA") that is to be used for distributing the total market value investment returns earned by the FRIT. The MRA serves a smoothing purpose as did the TAA but it distributes investment earnings and losses in a manner more directly related to market effects. The total amount of the TAA is frozen and distributed over five years. The only exception is that before freezing the TAA, the $4 billion is transferred out for internal funding of benefits provided under AB 495, including benefits to employers for non-Trust Fund purposes. See AB 495, sections 8 and 9.

46. The purpose of changing the smoothing, accounting mechanism from the TAA to the MRA is to distribute Trust Fund investment earnings and losses on a schedule more consistent with market cycles. This can, and will, be achieved through the phase-out of the TAA and transition to the MRA, which is a proper trust purpose and consistent with the smoothing flexibility necessary for Trust Fund investment distributions. That all can be accomplished, however, without first making a one-time, $4 billion transfer from the TAA to internally fund benefits.

47. The following charts demonstrate the manner in which the TAA would be distributed as of December 31, 1999, assuming a $15 billion TAA balance, under current law, under AB 495, and under AB 495 with a transition to the MRA but without the $4 billion transfer.

TAA DISTRIBUTION SCENARIOS ASSUMING $15 BILLION TAA AS OF DECEMBER 31, 1999(billion $)[1]

Current Law

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	12.00	9.60	7.68	6.14	4.91
20% Annual Distribution	3.00	2.40	1.92	1.54	1.23	0.98
One-Time Distribution	0.00					
TAA Phase-Out	0.00					
Ending Balance	12.00	9.60	7.68	6.14	4.91	3.93

[1]Example assures no future gains or losses after1999.

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	8.00	6.40	4.80	3.20	1.60
20% Annual Distribution	3.00					
One-Time Distribution	4.00					
TAA Phase-Out	0.00	1.60	1.60	1.60	1.60	1.60
Ending Balance	8.00	6.40	4.80	3.20	1.60	0.00

5 Year Transition to MRA Without any One-Time Recognition

	1999	2000	2001	2002	2003	2004
Pre-Distribution TAA Balance	15.00	12.00	9.60	7.20	4.80	2.40
20% Annual Distribution	3.00					
One-Time Distribution	0.00					
TAA Phase-Out	0.00	2.40	2.40	2.40	2.40	2.40
Ending Balance	12.00	9.60	7.20	4.80	2.40	0.00

48. The transition from the TAA to the MRA without the $4 billion transfer from the TAA smooths, and reduces, the adverse impact on participants to a much greater extent than the $4 billion transfer, which only serves to greatly exacerbate inequities in the sharing of the $4 billion.

49. As part of the $4 billion TAA transfer, approximately $647 million was used to make a direct payment to employers of Trust Fund monies. AB 495 directs that $200 million of the amount deposited into the employer accumulation reserve be diverted to an employer credit account. To achieve that $200 million deposit into an employer credit account, the legislature reverse engineered the amount of money that would have to be deposited into all three accounts to generate the $200 million employer credit account. The amount required to generate the $200 million employer credit is approximately $647 million.

50. The funds in the employer accumulation reserve are for the exclusive purpose of paying participant benefits. Section 40.04(5)(c), Stats. The $200 million employer credit account nominally created within the employer accumulation reserve by AB 495 is used to pay the unfunded prior service liability debt owed by employers to the WRS. To the extent any employer does not have such a debt to the WRS, the employer is credited out of the $200 million employer reserve credit account for employer required contributions to the WRS in future years. AB 495, section 27(1)(b).

51. The employer credit account of $200 million is a diversion of $200 million of Trust Fund monies, in which WRS participants have a protected property and contract right. The $200 million is given to employers, who have no right or entitlement to the money, so that the employers can use the money to pay either their unfunded prior service liability debt or future contribution debts to the Trust Fund. To the extent employers have an unfunded liability debt owed to the Trust Fund, $200 million of Trust Fund monies are being used to pay that debt owed to the Trust Fund. To the extent employers have required contributions as determined by the Board and actuary, those contribution debts are being paid from the $200 million Trust Fund monies.

52. Under current law, employee and employer contributions to the fund are based on certain assumed interest rates and assumed salary increases. The assumed interest rate set by statute is 7.5% and the assumed salary increases are set at 1.9% less than the assumed rate. Section 40.02(7), Stats. The Board may approve different rates based on the recommendations of the actuary designated by the Board. *Id.*

53. AB 495 increases the assumed interest rate to 8% and increases the differences between the assumed salary increases and the assumed interest rate to 3.4%. Although AB 495 leaves in place the ability of the Board, on recommendation by the actuary, to approve a different rate "due to changed economic circumstances," it directs that the new assumptions be used "for the 2001 calendar year." AB 495, sections 5 and

28(1). Thus, the discretion of the Board, based on the recommendation of the actuary, has been limited by AB 495 because the ability to choose different rates is limited in time to after the 2001 calendar year and even then only until changed economic circumstances could be used to again invest discretion within the Board. The increase in the spread between assumed salary increases and the assumed interest rate serves to decrease the amount of contributions made to the Trust Fund. The actuary did not recommend these assumption changes to the Board and the Board did not approve them.

54. The maximum amount of an initial annuity for a WRS participant who receives an annuity that is calculated using the formula multiplier, other than a protective occupation participant, is increased by 5% of the participant's final average earnings. Section 40.23(2m)(b), Stats.; AB 495, section 16.

55. As of December 31, 1998, 17,609 active WRS participants were protective occupation participants.

POSITION OF PROPOSED INTERVENING PETITIONERS

56. The use of $647 million to create the $200 million employer credit to be used to pay unfunded prior service and contribution debts owed by employers to the WRS is not a proper use of Trust Fund investment earnings. The use of the $647 million to establish the $200 million employer credit account violates section 40.19(1), Stats.; is a taking of WRS participants', including Proposed Intervening Petitioners', property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

57. The changes in assumptions of section 40.02(7), Stats., required by AB 495, section 5, constitute an usurpation of the Board's discretion and, accordingly, violates section 40.19(1), Stats.; is a taking of WRS participants' including Proposed Intervening Petitioners' property without just

compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

58. The recognition of $4 billion from the TAA for use other than a smoothing mechanism in contravention of the purpose of the TAA is a violation of section 40.19(1), Stats.; is a taking of WRS participants' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

59. Approximately 51,000 inactive WRS participants do not share in the $4 billion and will receive reduced annuity dividends because of the transfer of the $4 billion from the TAA. This circumstance is a violation of section 40.19(1), Stats.; is a taking of WRS participants', including Proposed Intervening Petitioners' property without just compensation and without due process in violation of U.S. Const. Amendment 14 and Wis. Const. Art. I, Section 13; and constitutes an impairment of contract in violation of U.S. Const. Art. I, section 10, clause 1 and U.S. Const. Art. I, section 12.

60. The transition from the TAA accounting smoothing mechanism to the MRA accounting smoothing mechanism by freezing the full amount of the TAA, without the $4 billion transfer, would be a permitted legislative action under section 40.19(1), Stats., because it would exchange the vested benefit rights of WRS participants in the TAA with equal or greater benefits in the MRA, which is a proper trust investment smoothing device. Moreover, under the transition from the TAA to the MRA without the $4 billion transfer from the TAA, the entire remaining balance of the TAA at the end of 1999 will be recognized over five years and available to be applied to contribution rates or benefit changes, including those created by AB 495.

61. The $4 billion TAA transfer, the changes in assumed interest and salary rates and the $647 million transfer

used to create the $200 million employer credit account were not needed or necessary to preserve actuarial soundness of the Trust Fund or to salvage the Trust Fund, because it is not financially troubled.

62. The actuary's report provided to the legislature did not recommend an early recognition from the TAA. The actuary report did comment approvingly on transition from the TAA to the MRA. A copy of the Wisconsin Retirement System Actuarial Valuations of Alternate Benefit and Financing Provision, prepared for the Senate Committee on Organization, July, 1999, is attached hereto as Exhibit A.

63. Raising the final average earnings cap by 5% under section 40.23(2m)(b), Stats., but excluding protective occupation participants from the increase, is a violation of Proposed Intervening Petitioners' equal protection rights under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1 belonging to some members of the Proposed Intervening Petitioners.

64. Increasing the formula multiplier for creditable service prior to January 1, 2000 and using the internal funding provided in AB 495 but excluding approximately 51,000 WRS participants who are inactive on January 1, 2000 from receiving the increases for their prior creditable service raises the question of whether their exclusion violates the equal protection clause under U.S. Const., Amendment 14 and Wis. Const. Art. I, section 1.

REQUEST FOR RELIEF

WHEREFORE, Proposed Intervening Petitioners request that the Supreme Court declare their rights with regard to AB 495, as follows:

1. Declare AB 495, section 27(1)(B) unconstitutional to the extent that it transfers $647 million from the TAA for purposes of creating the $200 million employer credit account;

2. Declare AB 495, section 5 unconstitutional to the extent that it changes the assumed rates set forth in section 40.02(7), Stats.;

3. Declare AB 495, section 27(1)(a) unconstitutional to the extent that it directs a $4 billion transfer from the TAA the accounts and reserves of the FRIT;

4. Declare AB495 unconstitutional to the extent that it raises the final average earnings cap by 5% using the internal funding sources provided in AB 495 but excludes protective occupation participants from the increase.

5. Declare AB 495 unconstitutional to the extent that it increases the formula multiplier for creditable service prior to January 1, 2000 using the internal funding sources provided in AB 495 but excludes approximately 51,000 WRS participants who are inactive on January 1, 2000 from receiving the increase for their prior creditable service.

6. Declare that the transition from the TAA to the MRA under the terms of AB 495, sections 8 and 9, to be a proper exercise of legislative authority under section 40.19(1), Stats., but without the $4 billion transfer;

7. Sever those portions of AB 495 declared to be unconstitutional from the remaining portions of AB 495, the result of which will be that any remaining provisions will be funded by the proper transition of investment smoothing mechanisms from the TAA to the MRA and, if necessary, by

future employer and employee contributions; and

8. Provide such other legal and equitable relief as is appropriate.

Dated this 28th day of January, 2000.

Respectfully Submitted,

CULLEN, WESTON, PINES & BACH
By:

/s/ Lester A. Pines
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APPENDIX J

STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA

EMPLOYE TRUST FUNDS BOARD, THE DEPARTMENT OF EMPLOYE TRUST FUNDS and ERIC O. STANCHFIELD, Secretary of the Department of Employe Trust Funds,

Petitioners,

STATE ENGINEERING ASSOCIATION, by its President, THOMAS H. MILLER, DAVID BUSCHKOPF, ROSS JOHNSON, MELVIN SENSENBRENNER, BERNARD KRANZ and THOMAS H. MILLER,

Proposed Intervening Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, JACK C. VOIGHT, Wisconsin State Treasurer, WISCONSIN EDUCATION ASSOCIATION COUNCIL, by its President, TERRY CRANEY and its Vice-President, STAN JOHNSON, and DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN, and PHYLLIS POPE,

Respondents.

COMPLAINT

NOW COME the above named Proposed Intervening Petitioners, by their attorneys, Haus, Resnick and Roman, LLP, by William Haus and Michael E. Banks, and allege as follows:

PARTIES

1. Petitioner, State Engineering Association ("SEA") is a labor organization and representative of employees within the meaning of § 111.81(12) and (17), Wis. Stats. respectively and represents the approximately 1,300 employees included in the engineering bargaining unit referred to in § 111.825(1)(f)8, Wis. Stats.; its principal offices are located at 4510 Regent Street, Madison, Wisconsin 53705.

2. Petitioner, Thomas H. Miller, is an adult resident of the State of Wisconsin; he is currently President of the State Engineering Association, serves on its Board of Directors, and is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 810 South Grand Avenue, Waukesha, Wisconsin 53186.

3. Petitioner, David Buschkopf, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 1302 Pioneer Road, Watertown, Wisconsin 53098.

4. Petitioner, Ross Johnson, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 327 Roosevelt Avenue, Eau Claire, Wisconsin 54701.

5. Petitioner, Melvin Sensenbrenner, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 4701 Goldfinch Drive, Madison, Wisconsin 53714.

6. Petitioner, Bernard Kranz, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 2425 George Street, LaCrosse, Wisconsin 54603.

7. Respondent, George Lightbourn,, is the Acting Secretary of the Wisconsin Department of Administration, whose current office address is 101 East Wilson Street, 10th Floor, Madison, Wisconsin 53702.

8. Respondent, Jack C. Voight, is the Wisconsin State Treasurer, whose current address is 1 South Pinckney Street, 5th Floor, Madison, Wisconsin 53703.

BACKGROUND

9. The Wisconsin Retirement System (hereafter referred to as the "WRS") is a system for providing benefits as provided in Ch. 40, Wis. Stats. The WRS is administered by the Employee Trust Funds Board (the "ETF Board") and its appointed Secretary of the Department of Employee Trust Funds ("DETF").

10. As provided in § 40.01(1) and (2), Wis. Stats., the public employee trust fund (hereinafter also referred to as the "Fund") was created for the purpose of aiding public employees in protecting themselves and their beneficiaries against the hardships of old age, disability, death, illness and accident. Pursuant to statute, it is a public trust to be " ...managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515 (1) (um) or (ut) or 40.04 (2), and shall not be used for the purposes of any other benefit plan. .... All statutes relating to the

fund shall be construed liberally in furtherance of the purposes set forth in this section."

11. Under § 40.19(1), Wis. Stats., "[r]ights exercised and benefits accrued to an employe under this chapter [(chapter 40)] for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act."

12. The monies held in the Fund are not state funds. The monies in the Fund have been irrevocably placed in trust for the benefit of WRS participants and the State cannot direct the use of such money for non-Trust purposes.

13. WRS participants have a property interest and contractual right in the proper use of the assets and earnings of the Fund. The legislature is not free to spend or appropriate the assets or earnings of the Fund. except in a manner and for the purposes authorized by statute relating to the WRS. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558-59, 544 N.W.2d 888, 892 (1996).

14. When an exclusive grant of discretionary authority has been given statutorily to the ETF Board, the WRS participants have a property interest in the preservation of the ETF Board's authority. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 20, 558 N.W.2d 83, 91 (1997).

15. WRS Participants have a contractual relationship with the state and a vested right in the WRS. The WRS participants' property right extends to the WRS as a whole. *Id.* at 19. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996).

16. "Governmental takings do not become exempt from due process requirements simply because they may be actuarially insignificant. ... The gravity of a property deprivation is irrelevant to the question of whether such rights are violated without due process. *Id.* at 560. Any pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly

as possible." *Id.* "While the specific transfer of trust funds ... may not immediately threaten the benefits of vested ... beneficiaries, the precedent set by such a transfer certainly could." *Id.* at 562.

17. Legislative intervention into the Fund is only constitutional in limited circumstances such as "when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." To be constitutional, legislative intervention must be reasonable, "needed" and "necessary to protect actuarial soundness." *Id.* at 563-64.

18. Participants in the WRS are entitled to defined benefits calculated as a formula involving their final average monthly earnings multiplied by their years of creditable service. Different percentage multipliers are used for calculating the benefits to be paid to different groups of participating employees.

19. Employees and employers participating in the WRS pay a percentage of payroll as a defined contribution into the Fund. Sections 40.05(1) and (2), Wis. Stats. Individual accounts are maintained for each non-annuitant participant, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated additional and required contributions plus an amount from the employer accumulation reserve equal to the participant's accumulated required contributions. Section 40.23(3), Wis. Stats.

20. Within the Fund, there is a fixed retirement investment trust ("FRIT"), which is a pooled fund consisting of contributions made by and on behalf of participants. The FRIT receives funds from three sources: (1) contributions from participating employees; (2) contributions from participating employers; and (3) investment earnings on employee and employer contributions.

21. Within the FRIT, there are a number of accounts relevant to this proceeding. These accounts include:

A. An employee accumulation reserve account which holds funds related to employee contributions. Section 40.04, Wis. Stats.

B. An employer accumulation reserve account which holds funds related to employer contributions. Section 40.04(5), Wis. Stats.

C. An annuity reserve account. When a participating employee retires and elects to take an annuity, an amount sufficient to fund his or her annuity is transferred from the employer and employee reserves into the annuity reserve. Section 40.04(6), Wis. Stats.

D. The Transaction Amortization Account ("TAA"). Section 40.04(3), Wis. Stats. The TAA is an accounting device for calculating and adjusting investment gains that are not yet realized. One of the major purposes of the TAA is to smooth out the effects of swings in the unrealized gains and losses in the FRIT, and to thereby improve equity among WRS participants in the effects of investment gains and losses on their retirement accounts. Every year, the FRIT is credited with 20% of the TAA balance. This 20% amount is divided proportionally among the FRIT's three reserve accounts.

22. Each WRS participant has a separate account maintained in the employee accumulation reserve within the FRIT. Section 40.04(4)(a), Wis. Stats.

23. The employer accumulation reserve is a pooled fund that is maintained without regard to the identity of any

individual employer. Individual accounts are not maintained in the employer accumulation reserve. Section 40.04(5), Wis. Stats.

24. Funds in the employer accumulation reserve may only be used to fund benefits to WRS participants and their beneficiaries. Such benefits can only be provided in accordance with the requirements of ch. 40 of the Wisconsin Statutes. Employers do not have any vested interest in the funds in the employer accumulation reserve or any other funds in the WRS. WRS participants and their beneficiaries have both property rights and contractual rights in the funds in the employer accumulation reserve and all other funds in the WRS. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 19, 558 N.W.2d 83, 91 (1997).

25. In addition to the required annual employer contributions, employers are required to pay contributions for any unfunded prior service liability that is owed to the WRS. Such unfunded prior service liability arises from such occurrences as past benefit improvements under the WRS that were not fully funded at the time of their creation, and for recognizing service of employees rendered prior to the employer becoming a covered employer under the WRS. Employer contribution rates for unfunded prior service liability are paid on a 40-year amortization. Section 40.05(2)(b), Wis. Stats. Each employer is statutorily required to continue making contributions toward the employer's unfunded service liability until such liability is paid in full. Section 40.05(2)(bm), Wis. Stats.

26. Respondent Voight is the treasurer of the Fund. Section 40.03(4), Wis. Stats.

27. The Board is required to select and retain the actuary or actuarial firm which shall perform all actuarial services necessary for the operation and control of the Fund. Section 40.03(1)(d), Wis. Stats. Contribution rates and actuarial assumptions determined by the actuary, including the assumed interest rate and the assumptions for future changes in employee salary rates, are subject to approval of the Board.

Section 40.03(1)(e), Wis. Stats. These actuarial assumptions determine employee and employer contributions to the Fund and are to be based on the actual experience of the WRS, unless lack of adequate information or unusual circumstances are specifically identified and fully described which require use of other groups' experience and such other experience is not inconsistent with the WRS's own experience. Section 40.03(5)(b), Wis. Stats.

OPERATIVE FACTS

28. AB 495 was passed in both the Assembly and Senate on October 6, 1999.

29. AB 495 provides that, on December 31, 1999, $4 Billion is to be distributed from the TAA to the reserves and accounts of the FRIT in an amount equal to a percentage of the total distribution determined by dividing each reserve's and account's balance on the prior January 1 by the total balance of the FRIT on the prior January 1.

30. The $4 Billion recognized from the TAA pursuant to AB 495 is not for the purpose of smoothing the recognition of investment gains and losses or to achieve equity among WRS participants in the effects of investment gains and losses on their retirement accounts. Such funds are being used to fund benefits created by AB 495 and to reduce the obligations of participating employers who have no beneficial interest in the assets or earnings of the WRS.

31. AB 495 provides that $200,000,000 of the increase in the fixed employer accumulation reserve that results from the distribution of $4 Billion from the TAA will be used to establish contribution credits for payments for employers that have unfunded prior service liability under the WRS. For those employers that do not have unfunded prior service liability, the credits will be used to make payments for their required employer contributions under the WRS. During the period in which the credits are used, the employers that have unfunded prior service liability will not be required to make payments for unfunded prior service liability, and those employers that do not

have unfunded prior service liability will not be required to make employer-required contributions. After an employer's credits are consumed, the employer is required to resume making required employer contributions. AB 495, Sections27(1)(a) and (b)1.

32. As part of the $4 Billion TAA transfer, approximately $647 Million is being used to make a direct payment of Fund monies to employers. To achieve its goal of diverting $200 Million of the amount deposited into the employer accumulation reserve to pay for unfunded prior service liability and required employer contributions as provided in AB 495 Sections 27(1)(a) and (b)(1), the legislature reverse engineered the amount of money that would have to be deposited in all three accounts to generate the $200 Million employer credit account. The amount required to generate the $200 Million employer credit account is approximately $647 Million.

33. The funds in the employer accumulation reserve are for the exclusive purpose of paying participant benefits. Section 40.04(5)(c), Wis. Stats. The employer credit account of $200 Million is a diversion of Fund monies for non-Trust purposes, and is for the exclusive benefit of employers who have no right or entitlement to the assets of the WRS.

34. AB 495 increases the percentage multipliers used in calculating a participant's annuity for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased from 2% to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased from 2.5% to 2.665%. For all other participants in the WRS, the percentage multiplier is increased from 1.6% to 1.765%. The increase in the percentage multiplier first applies to the calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service performed on or after January 1, 2000, AB 495 provides that the current law percentage multiplier will apply. AB 495,

Sections 17-20.

35. To the extent the increased percentage multipliers are funded by the $4 Billion transfer from the TAA, the resulting increase in benefits is not being funded with state funds. In addition, the $4 Billion is not being shared equitably by WRS participants. Those participants with longer creditable service as of January 1, 2000 will receive more of the $4 Billion by virtue of the formula increase, which is not consistent with the TAA's purpose to promote equitable sharing of gains and losses in the Fund, rather than having the recognition of gains or losses concentrated in any one year.

36. Under current law, employee and employer contributions to the fund are based on certain assumed interest rates and salary increases. The assumed interest rate set by statute is 7.5%, and the assumed salary increases are set at 1.9% less than the assumed rate. Section 40.02(7), Wis. Stats. The Board may approve different rates based on the the recommendations of the actuary designated by the Board.

37. AB 495 increases the assumed interest rate to 8%, and increases the differences between the assumed salary increases and the assumed interest rate to 3.4%. Although AB 495 leaves in place the ability of the Board, on recommendation of the actuary, to approve a different rate "due to changed economic circumstances," it directs that the mandated assumptions be used "for the 2001 calendar year." AB 495 Sections 5 and 28(1). These provisions of AB 495 limit the discretion of the Board in the following respects:

A. The discretion of the board to change the assumed interest rate based on the recommendation of the actuary is completely removed for time periods following the effective date of AB 495 through the expiration of the 2001 calendar year.

B. After the 2001 calendar year, the discretion of the Board to change the

assumed interest rates based on the recommendation of the actuary from those imposed by AB 495, is limited to where such change is "based upon changed economic circumstances."

38. The increase in the spread between assumed salary increases and assumed interest rates results in a decrease in the contributions made to the Fund, thereby posing a potential threat to the actuarial soundness of the Fund. The actuary did not recommend these assumption changes, and the Board did not approve these changes.

39. AB 495 increases the maximum amount of an initial annuity for a WRS participant who receives an annuity that is calculated using the formula multiplier, other than a protective occupation participant, by 5% of the participant's final average earnings. AB 495, Section 16. As of December 31, 1998, 17,609 active WRS participants were protective occupation participants.

40. By Order dated December 29, 1999, the Wisconsin Supreme Court preliminarily enjoined implementation or enforcement of AB 495 and AB 584.

CAUSES OF ACTION

41. The use of $647 Million to achieve the goal of diverting $200 Million of the amount deposited into the employer accumulation reserve to pay for unfunded prior service liability and required employer contributions, as provided in AB 495 Sections 27(1)(a) and (b)(1), is an improper use of the Fund's investment earnings. The use of the Fund's investment earnings in this manner is unlawful in the following respects:

A. It violates Section 40.19, Wis. Stats.;

B. It is a taking of WRS participants' property without due process of law and without just compensation in violation

of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and

C. It constitutes an impairment of contract in violation of art. I, § 12 of the Wis. Const. and art. I, § 10, cl. 1 of the U.S. Const.

42. The changes in assumptions of Section 40.02(7), Wis. Stats., required by AB 495 Section 5, constitutes a usurpation of the Board's discretion and is unconstitutional. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 20, 558 N.W.2d 83, 91 (1997). These changes in assumptions are unlawful in the following respects:

A. They violate Section 40.19, Wis. Stats.;

B. They are a taking of WRS participants' property without due process of law and without just compensation in violation of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and

C. They constitute an impairment of contract in violation of art. I,§ 12 of the Wis. Const. and art. I, § 10, cl. 1 of the U.S. Const.

43. The recognition of $4 Billion from the TAA under AB 495 is unlawful in the following respects:

A. It violates Section 40.19, Wis. Stats.;

B. It is a taking of WRS participants' property without due process of law and without just compensation in violation of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and

C. It constitutes an impairment of contract in violation of art. I, § 12 of the Wis.

Const. and art. I, § 10, cl. 1 of the U.S. Const.

D. It constitutes the unlawful use assets of the WRS, which are not state funds, for the purpose of funding a grant of extra compensation in violation of Wis. Const. Art. IV, § 26.

44. The $4 Billion TAA transfer, changes in the assumed interest and salary rates and the $647 Million transfer used to create the $200 Million employer credit account were not "needed" or "necessary to preserve the actuarial soundness of [the WRS] or to salvage financially troubled funds," and, therefore, are unconstitutional. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 563-64, 544 N.W.2d 888, 894 (1996).

45. AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, without providing for state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

WHEREFORE, Petitioners demand judgment as follows:

1. Declare that AB 495, Sections 27(1)(a) and (b) are invalid and unconstitutional, and that they violate Petitioners' contractual and property rights.

2. Declare AB 495, Section 5 unconstitutional to the extent it changes the assumed rates set forth in Section 40.02(7), Wis. Stats.

3. Declare that AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, but failing to provide state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

4. Sever the invalid and unconstitutional provisions of AB 495 from those that are valid, and permanently enjoin the

implementation of the invalid and unconstitutional provisions.

5. Order that Respondents pay Petitioners costs, attorney fees and disbursements.

6. Such other and further legal and equitable relief as the court deems just and proper.

Dated at Madison, Wisconsin, this 28th day of January, 2000.

HAUS, RESNICK and ROMAN, LLP
Attorneys for Proposed Intervening Petitioners

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APPENDIX K

STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, INC., JOHN CHAREWICZ, DAVID MAHONEY, SUSAN ARMAGOST, STEVEN URSO AND STATE ENGINEERING ASSOCIATION, by its President, THOMAS H. MILLER, DAVID BUSCHKOPF, ROSS JOHNSON, MELVIN SENSENBRENNER, BERNARD KRANZ and THOMAS H. MILLER,

Petitioners,

v.

GEORGE LIGHTBOURN, Secretary of the Wisconsin Department of Administration, JACK C. VOIGHT, Wisconsin State Treasurer, WISCONSIN EDUCATION ASSOCIATION COUNCIL, by its President, TERRY CRANEY and its Vice-President, STAN JOHNSON, and DONALD KRAHN, MARGARET GUERTLER, GERALD MARTIN, and PHYLLIS POPE,

Respondents.

SUPPLEMENT TO THE COMPLAINT

NOW COME Petitioners, the State Engineering Association, by its President, Thomas H. Miller, and David Buschkopf, Ross Johnson, Melvin Sensenbrenner, Bernard Kranz and Thomas H. Miller (the "SEA Petitioners"), by their attorneys, Haus, Resnick and Roman, LLP, by William Haus and Michael E. Banks, and hereby Supplement the Complaint filed by the Wisconsin Professional Police Association ("WPPA"), in accordance with this Court's Order dated

February 25, 2000 in the above-captioned matter. This Supplement sets out those claims and other matters raised by the SEA Petitioners that differ from, or are in addition to, those in the complaint filed by the WPPA in this matter. The SEA Petitioners specifically reserve the right to assert any and all claims, facts and other matters contained in the WPPA Complaint.

PARTIES

The following parties are added as Petitioners to the WPPA Complaint:

1. Petitioner, State Engineering Association ("SEA") is a labor organization and representative of employees within the meaning of § 111.81(12) and (17), Wis. Stats. respectively and represents the approximately 1,300 employees included in the engineering bargaining unit referred to in § 111.825(1)(f)8, Wis. 8tats.; its principal offices are located at 4510 Regent Street, Madison, Wisconsin 53705.

2. Petitioner, Thomas H. Miller, is an adult resident of the State of Wisconsin; he is currently President of the State Engineering Association, serves on its Board of Directors, and is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 810 South Grand Avenue, Waukesha, Wisconsin 53186.

3. Petitioner, David Buschkopf, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 1302 Pioneer Road, Watertown, Wisconsin 53098.

4. Petitioner, Ross Johnson, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a

participant in the Wisconsin Retirement System; his current address is 327 Roosevelt Avenue, Eau Claire, Wisconsin 54701.

5. Petitioner, Melvin Sensenbrenner, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 4701 Goldfinch Drive, Madison, Wisconsin 53714.

6. Petitioner, Bernard Kranz, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 2425 George Street, LaCrosse, Wisconsin 54603.

STATEMENT OF ISSUES

The following issues are hereby added to the Complaint filed by the WPPA:

7. Whether the $4 Billion TAA transfer, changes in the assumed interest and salary rates and the $647 Million transfer used to create the $200 Million employer credit account were needed or necessary to preserve the actuarial soundness of the Wisconsin Retirement System (the "WRS") or to salvage financially troubled funds.

8. Whether the provisions of AB 495, if legally permissible, establish a precedent that jeopardizes the Fund, or poses a potential threat to the actuarial soundness or solvency of the fund.

9. Whether the use of the $4 Billion recognized from the TAA to fund new benefits under AB 495 constitutes a violation of Wis. Const. Art. IV, § 26.

10. Whether AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, without providing for state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

OPERATIVE FACTS

11. The employer credit account of $200 Million has been designated for the payment of preexisting current and ongoing obligations that participating employers have for the payment of unfunded prior service liabilities under Section 40.05 (2)(b). The funding of participating employers' current and ongoing obligations with trust funds produces an immediate financial benefit to participating employers by relieving them of such current obligations. Such a diversion of trust funds does not benefit beneficiaries of the trust and is a use of trust funds for the payment of obligations that must legally be paid by participating employers with state funds.

12. AB 495 increases the assumed interest rate to 8%, and increases the differences between the assumed salary increases and the assumed interest rate to 3.4%. This effectively suspends the actuarial and Board determination of these important figures and manipulates the assumptions necessary for determining funding requirements of the WRS for the purpose of absorbing the cost of additional or altered benefits under AB 495. AB 495 directs that its mandated assumptions be used "for the 2001 calendar year." AB 495 Sections 5 and 28(1). These provisions of AB 495 unlawfully limit the discretion of the Board in the following respects:

A. The discretion of the board to change the assumed interest rate based on the recommendation of the actuary is completely removed for time periods following the effective date of AB 495 through the expiration of the 2001 calendar year.

B. After the 2001 calendar year, the discretion of the Board to change the

assumed interest rates based on the recommendation of the actuary from those imposed by AB 495, is limited to where such change is "based upon changed economic circumstances."

13. The Legislature's interference with the actuarial determination of the spread between assumed salary increases and assumed interest rates affects the contribution formula and results in a decrease in the contributions required of participating employers under Chapter 40, thereby providing a direct benefit to participating employers. Such legislative manipulation of the assumptions used in determining contribution levels to the Fund, if determined to be legally appropriate, poses a potential threat to the financial integrity, solvency and actuarial soundness of the Fund. Such assumptions must, under the terms of the Chapter 40 contract rights, be determined by the Board based on actuarial recommendations. No actuary recommended the assumptions mandated by the Legislature and the Board did not approve these changes.

CAUSES OF ACTION

14. The transfer of $4 Billion from the TAA to fund the new benefits provided by AB 495 is unconstitutional in that it constitutes the unlawful use of the assets of the WRS, which are not state funds, for the purpose of funding a grant of new and increased benefits in violation of Wis. Const. Art. IV, § 26.

15. The $4 Billion TAA transfer, changes in the assumed interest and salary rates and the $647 Million transfer used to create the $200 Million employer credit account were not "needed" or "necessary to preserve the actuarial soundness of [the WRS] or to salvage financially troubled funds," and, therefore, are unconstitutional. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 563-64, 544 N.W.2d 888, 894 (1996).

16. AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1,

2000, without providing for state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

WHEREFORE, Petitioners supplement WPPA's original complaint with the following additional demands, and ask that the Court:

1. Declare that AB 495 providing for the transfer of $4 billion to fund new benefits and reduce employer contributions is unconstitutional to the extent it uses WRS assets for the purpose of funding new and increased benefits in violation of Wis. Const. Art. IV, § 26.

2. Declare that AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, but failing to provide sufficient state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

3. Declare that the$4 Billion TAA transfer, changes in the assumed interest and salary rates and the $647 Million transfer used to create the $200 Million employer credit account are unconstitutional.

4. Order that Respondents pay Petitioners costs, attorney fees and disbursements.

5. Such other and further legal and equitable relief as the court deems just and proper.

Dated at Madison, Wisconsin, this 1st day of March, 2000.

HAUS, RESNICK and ROMAN, LLP
Attorneys for Intervening Petitioners

By: /s/ William Haus
WILLIAM HAUS
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APPENDIX L

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
114 East State Capitol
P.O. Box 7857
Madison, WI 53707-7857

January 15, 1999

Eric O. Stanchfield
Secretary
Department of Employe Trust Funds
801 West Badger Road
P.O. Box 7931
Madison, WI 53707-7931

RE: Proposed adjustment of employers' unfunded actuarial liability balance under the Wisconsin Retirement System

Dear Secretary Stanchfield:

Attorney General James E. Doyle has asked me to respond to your letter (Request Letter) to him in which you requested the opinion of this office on whether the Employe Trust Funds Board (ETFB) has the statutory authority to adjust the balance of the unfunded accrued actuarial liability (UAAL) of the Wisconsin Retirement System (WRS) when the actuary recommends changes in the actuarial assumptions that were used to develop the initial UAAL balance. You also requested the opinion of this office on several related matters, contingent upon our answer to the initial question. In accordance with your letter to me dated January 8, 1999, this opinion addresses only the initial question stated above.

Summary Answer

I am of the opinion that there is no statutory authority for the ETFB to adjust the balance of the UAAL of the WRS

when the actuary recommends changes in the actuarial assumptions that were used to develop the initial UAAL balance. Any such adjustment must be authorized by the legislature.

Background

In your Request Letter you state that, in December 1997, the actuary recommended that the UAAL balances be reduced for all employers with a current UAAL balance, in order to reflect the most recent actuarial assumptions that were recommended by the actuary and approved by the ETFB. You further stated that the adjustment would reduce the current UAAL balance by approximately 20%.

Definitions

Although the terms used in your request, "UAAL" and "unfunded accrued actuarial liability", are commonly used by the statutory consulting actuary and the Department of Employe Trust Funds (DETF) to describe the unfunded liabilities of participating employers, Chapter 40 of the Wisconsin Statutes itself does not define or use those terms. For purposes of this opinion, then, I want to clarify the liabilities that are included in the terms "UAAL" and "unfunded accrued liability."

In your Request Letter, you state that a UAAL is created in the WRS under two conditions:

(1) When an employer initially commences participation in the WRS and elects to recognize the prior creditable services of its employes as provided under s.40.21(6), Wis. Stats., and

(2) When, due to a benefit improvement authorized by legislation, the benefit improvements are applied to past creditable service thereby creating additional past service liabilities.

The statutory provision that governs the determination and payment of the liabilities described in your item (1) is paragraph

(b) of sec. 40.05, Wis. Stats.[1] Paragraph (b) also governs the determination and payment of liabilities described in your item (2), but only if the legislature has expressly provided for the funding of such liabilities under paragraph (b). Retroactive benefit improvements for which the legislature does not expressly provide the source of funding are funded as current service liabilities under paragraph (a) of sec. 40.05(2). It is my understanding that only those prior service liabilities for which funding is required under paragraph (b) of sec. 40.05(2) are included in the unfunded prior service liability balance for which the actuary has recommended a reduction. In this opinion, then, a "UAAL" is a liability which is funded under paragraph (b).

Analysis and Discussion

Administrative agencies have only those powers expressly conferred or necessarily implied by the statutes under which they operate. Any reasonable doubt as to the existence of an implied power should be resolved against the exercise of such power. Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983); State (Dept. of Admin.) v. ILHR Dept., 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977). The powers and duties of the ETFB, the DETF, the Secretary of DETF and the consulting actuary for WRS are prescribed in Chapter 40, Wisconsin Stats. Thus, the answer to your question is a matter of statutory construction of the relevant provisions of chapter 40.

I first considered whether the statutory provision that defines the formula that the actuary must use to calculate the monthly contributions that amortize the UAAL balance–sec. 40.05(2)(b)–confers the necessary authority on the ETFB to adjust the balance of the UAAL to reflect modifications in actuarial assumptions.

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[1] Unless otherwise indicated, all statutory references in this opinion are to Wisconsin Statutes, as currently in effect. References to paragraphs (a), (am) and (b) are references to those paragraphs in sec. 40.05(2).

Sec. 40.05(2). Employer Retirement Contributions. For Wisconsin retirement system purposes . . .

(b) Contributions shall be made by each participating employer for **unfunded prior service liability** in a percentage of the earnings of each participating employe. A separate percentage rate shall be determined for the employe occupational categories under s. 40.23(2m) as of the employer's effective date of participation. The rates shall be sufficient to amortize as a level percent of payroll over a period of 40 years from the later of that date or January 1, 1986, the unfunded prior service liability for the categories of employes of each employer determined under s. 40.05(2)(b), 1981 stats., increased to reflect any creditable prior service granted on or after January 1, 1986, increased to reflect the effect of 1983 Wisconsin Act 141, increased at the end of each calendar year after January 1, 1986, by interest at the assumed rate on the unpaid balance at the end of the year and adjusted under pars. (bv) and (bw).

(a) Statutory Language

When interpreting a statute, the plain meaning of the language of the statute is considered first. The language of paragraph (b) states that an employer's liability for "prior service" initially arises when the employer becomes a participating member in the WRS. Upon becoming a participating employer in the WRS, an employer elects, by resolution, the amount of WRS creditable service its employes will receive for service they performed for the employer prior to the effective date of the employer's participation.[2] The

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[2] "Creditable prior service" is defined in Sec. 40.02(26), Wis. Stats., as:

> all previous service for a participating employer of a person who became a participating employe on the effective date of

employer has the option of recognizing 100%, 75%, 50% or none of the prior service of its employes.[3] The employer's initial prior service liability is the expected cost of the future benefits that will be payable as a result of the employer's election. The more prior service the employer recognizes, the greater the future benefits the employer's employes on the effective date of participation will be entitled to receive, and, consequently, the greater the required employer contributions under paragraph (b) will be. Further an employer who initially elects to recognize only a portion of its employes' pre-WRS service under sec. 40.21(6) has the authority to later increase the amount of recognized prior service for employes who are still employed by the employer.[4] Both paragraph (b) and section 40.21(6) expressly authorize an adjustment to the UAAL to reflect any additional creditable prior service recognized by the employer.

The language of paragraph (b) does not, on its face, appear to provide authority to adjust the employer's UAAL balance to reflect changes in actuarial assumptions that occur after the employer's effective date of WRS participation. Instead, paragraph (b) provides for a calculation of a "level" or static contribution rate that is applied to an employer's monthly payroll over the specified 40-year period of amortization to determine the amount of the UAAL monthly contribution. Paragraph (b) expressly provides that the UAAL contribution rate is determined as of one date –the effective date of the employer's WRS participation. The employers' unfunded prior service liability, or UAAL, as of that date is one factor used to determine the contribution rate. That rate is fixed over the prescribed amortization period, except for adjustments that are specifically authorized by the legislature (such as those in

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participation for that employer if the service or employment conformed to the requirements for granting creditable current service, but no credit shall be granted for any period of service which was previously covered by a retirement system.

[3] Sec. 40.21(6)(a), Wis. Stats.

[4] Sec. 40.21(6)(a), Wis. Stats.

paragraphs (bv) and (bw) as expressly referenced in paragraph (b)). The dollar amount of an employer's monthly contribution required under paragraph (b), however, will fluctuate over the amortization period as the amount of payroll fluctuates.

Paragraph (b) also provides for the funding of liabilities in addition to those that arise out of creditable prior service for the participating employer. From time to time, the legislature has provided for the UAAL to be increased by the costs of a number of specific benefit improvements made by the legislature. Those adjustments are discussed under *Legislative History* below.

b. A comparison of paragraph (b) with paragraphs (a) and (am) of sec. 40.05(2), which do provide for recalculation to reflect changed actuarial assumption.

A comparison of the language used by the legislature in paragraphs (a) and (am), which govern the funding of all other unfunded liabilities for which funding is not otherwise provided (including current liabilities), to the language of paragraph (b) further indicates that paragraph (b) does not authorize the ETFB to adjust the UAAL to reflect changes in actuarial assumptions.

> **(a)** Each participating employer shall make contributions for **current service** determined as a percentage of the earnings of each participating employe, determined as though all employes of all participating employers were employes of a single employer, but with a separate percentage rate determined for the employe occupational categories specified under s. 40.23(2m). A separate percentage shall also be determined for subcategories within each category determined by the department to be necessary for equity among employers.
>
> **(am)** The percentage of earnings under par. (a) shall be determined on the basis of the information available at the time the determinations are

> made and on the assumptions the actuary recommends and the board approves by dividing the amount determined by subtracting from the then present value of all future benefits to be paid or purchased from the employer accumulation reserve on behalf of the then participants the amount then credited to the reserve for the benefit of the members and the present value of future unfunded prior service liability contributions of the employers under par. (b) by the present value of the prospective future compensation of all participants.

Both the current formula under paragraphs (a) and (am) and the UAAL formula under paragraph (b) provide a "snap-shot" of an employer's "balance sheet" on the date of determination – a valuation of the expected future costs of retirement benefits for employes on that date and of the assets expected to be available to pay those costs. The formula for current costs in paragraph (am), however, authorizes recalculation of the contribution amount, to be made annually,[5] while paragraph (b) provides only that the calculation of the UAAL is made as of the employer's effective date of WRS participation. In addition, paragraph (am) expressly provides that the annual recalculations of the current contribution rate are to be made "on the basis of the information available at the time the determinations are made and on the assumptions that the actuary recommends and the board approves." Paragraph (am) further expressly provides that the present values of the employer's retirement liabilities and assets are determined as of the date of the recalculation.

The yearly recalculation authorised by paragraphs (a) and (am), using current information, provides incremental adjustments to the current liabilities, with the result that the difference between the actuarial assumptions and experience is

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[5]The language of paragraphs (a) and (am) could justify a redetermination of the current contribution rate each time a monthly contribution is made; however paragraph (c) of sec. 40.05(2) limits the frequency of the redetermination of contribution rates to one time per year.

reduced. As stated in the 1991 opinion issued by this office (the "1991 AG Opinion"), to which you referred to in your Request Letter and which related to a proposed increase in the current service contribution rate:

> Each valuation provides a complete recalculation of assumed future risk experience and takes into account all past differences between assumed and actual risk experience. The result is a continual series of small adjustments to the computed contribution rate.

80 OAG 101, 108 (1991). Unlike paragraphs (a) and (am), the language of paragraph (b) does not either expressly, or by implication, authorize adjustments to the contribution rate to reflect changes in the actuarial assumptions.

c. Legislative History

The legislative history of sec. 40.05(2)(b) further supports the interpretation of the language of the statute that the legislature has not provided the ETFB with authority to adjust the UAAL balance to reflect changes in actuarial assumptions. Section 40.05(2) was adopted as part of the legislation that created the WRS by merging the three retirement funds that were then administered by the DETF into a single fund, effective January 1, 1982. At that time, the legislature defined an employer's WRS unfunded prior service liability as the employer's unfunded prior service liability under the applicable predecessor retirement system, adjusted to reflect any increases in prior service credit granted by the statutes that created the WRS–1981 Wis. Act 96.[6] A participating employer's initial

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[6] 1981 Wis. Act 96 granted WRS creditable service for certain military service performed before 1974 and certain executive service (sec. 40.02(17) (intro), 1981 stats.) which would not otherwise have been recognized as creditable prior service by new WRS employers. In addition, 1981 Wis. Act 96 granted WRS creditable service for certain prior WRS service if the employe had not taken a separation benefit; however, the employe was required to make a lump sum payment intended to fund the related liability (sec. 40.02(17)(b), 1981 stats.).

UAAL balance was a fixed number that was determined on the effective date of participation and was to be amortized, at a level percent of payroll, over the required amortization period.

Since the merger that created WRS on January 1, 1982, the legislature has adopted several benefit improvements for which it has provided funding under paragraph (b), either by an amendment to paragraph (b) or by providing in a separate legislative provision adding the cost of the newly adopted benefit improvements to participating employers' UAAL balances. In 1983 and 1989, the legislature further expressly authorized the recalculation of the UAAL and extended the amortization period of employers. The calculation fo the UAAL balance for an employer who was a participating employer at the time the 1981 Wis. Stats. were in effect, however, still begins with the UAAL balance that was determined under the 1981 Wis. Stats. version of the provision. The statute still looks back to the original amount, as it was calcula[illegible] under 1981 Wis. Stats.

In 1983, the legislature adopted 1983 Wis. Act 141, in which a number of improvements were made to WRS retirement benefits. Among them were the grant of an increase in the WRS benefit formula for all classes of participants, the grant of WRS creditable service for additional prior military service, an amendment of the normal retirement age, and a change in the prescribed actuarial discounts. See Report of Joint Survey Committee on Retirement Systems on 1983 Senate Bill 568 (adopted as 1983 Wis. Act 141), dated January 25, 1984. These provisions of 1983 Wis. Act 141 became effective on January 1, 1986. The legislature authorized the addition of the increase in the costs of future retirement benefits resulting from the improvements to the UAAL balance and further authorized the recalculation of the UAAL as of January 1, 1986, using the actuarial assumptions then in effect. To reduce the impact on the monthly UAAL contribution rate, the legislature also expressly increased the UAAL amortization period from 37 to 40 years beginning on January 1, 1986.

In 1989, the legislature again adopted a number of increases to future benefits. Paragraphs (bv) and (bw) were

added to sec. 40.05(2), and paragraph (b) was amended to provided for an adjustment to the UAAL contribution rate in order to fund two of the increases. Paragraph (bv) added the cost of sec. 40.02(15)(a)7, which granted creditable service for certain prior U.S. maritime service. See 1989 Wisconsin Act 230. Paragraph (bw) added the cost of sec. 40.02(17)(i) (formerly sec. 40.02(17)(f), when adopted), which granted creditable service for specified teacher improvement leave previously taken by University of Wisconsin system employes. See 1989 Wisconsin Act 359. In both cases, the legislature provided that the additional unfunded liability would be amortized over the remainder of the amortization period then in effect.

Later in 1989, the legislature adopted Act 13, which, as you note in your letter, included nonstatutory provisions in its section 47(2) that authorized a recalculation of the individual employer UAAL balances and contribution rates, the reallocation of liabilities between current and prior service to stabilize future total contribution rates and a new 40-year UAAL amortization period beginning January 1, 1990. That recalculation would have used the actuarial assumptions in effect at the time.[7]

Paragraph (b) was initially designed to provide funding for pre-WRS service that was recognized as WRS creditable service on the effective date of the employer's WRS participation. The employer contribution under paragraph (b) has evolved into a provision that provides funding for many additional retroactive benefit improvements that have been applied to employers after their initial UAAL was determined.

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[7] In the 1991 AG Opinion referred to in the Request Letter, this office opined that the authority granted in section 47(2) of 1989 Wisconsin Act 13 was a one-time grant of authority and once used could not again be used to reallocate liabilities. I note that the 1991 AG Opinion further opined that "[t]he ETFB had not statutory authority to adjust the UAAL in setting 1991 or later contributions rates." Although the latter statement arguably is broad enough to answer the question addressed in this opinion, it is, in fact, limited to the context of the issues addressed in that opinion and, consequently, this further opinion is required to answer your current question.

Paragraph (b) was amended to include the cost of each benefit improvement, which was determined at the time the improvement was adopted; however, no provision has been made to authorize a recalculation of the UAALs when there is a change in the actuarial assumptions that were in effect at the time of the initial calculation.

d. General authority provision in chapter 40

I also considered whether any authority for the ETFB to adjust UAAL balances can be found in the general Trust Purposes and Administration provisions of Chapter 40. Any authority granted by a chapter 40 provision must be read in furtherance of the purpose of the WRS. Section 40.01(2) states the purpose of the WRS as follows:

> The public employe trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost for the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan . . . and shall not be used for the purposes of any other benefit plan. Each member of the employe trust funds board shall be a trustee of the fund and the fund shall be administered by the department of employe trust funds. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section.

Section 40.01(2) provides that the fund is to be administered to fulfill the benefit commitments at the lowest possible cost. The proposed reduction in UAALs would reduce the amount of the monthly UAAL contributions. However, sec. 40.01(2) does not itself provide authority for the ETFB to take any action to reduce costs. It provides only a guideline for the interpretation of whatever authority is provided by the other statutes. I do not

find that any other provisions of chapter 40 authorize the recalculation of UAALs by the ETFB, based on the actuary's recommendation.

The ETFB is authorized to select and retain an actuary for the purpose of performing all actuarial services which are necessary for the operation and control of the WRS".[8] The ETFB is authorized to approve the tables used to compute WRS benefits after certification by the actuary[9] and to approve the contribution rates determined by the actuary[10] in accordance with paragraph (b). There is no statute that authorizes the ETFB to adjust or recalculate the UAALs other than expressly authorized in sec. 40.05(2).

Conclusion

As you point out in your Request Letter, without the ability to adjust the UAAL balance and the prior service contribution rates determined under paragraph (b), some employers may end up paying more than their actual final cost for grants of creditable prior service. It is also possible, if the actuarial assumptions were to change in the opposite direction, that some employers could end up paying less than their actual final costs. Some other states provide for an annual adjustment to be made to the unfunded prior service liability of government employers to reflect changes in actuarial assumptions. See Retirement Research Committee Staff Reports, Nos. 60, 74, and 77. In fact, the Wisconsin Retirement Fund (WRF), the predecessor to WRS, appears to have authorized annual adjustments to the employer's unfunded liability balance and the amount of contributions to reflect changes in actuarial

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[8] Sec. 40.03(1)(d), Wis. Stats.

[9] Sec. 40.03(1)b)(sic), Wis. Stats.

[10] Sec. 40.03(1)(c), Wis. Stats.

assumptions.[11] The WRS, however, does not currently provide such authority. The language of paragraph (b) very specifically enumerates the liabilities that are to be included in "prior unfunded liabilities" and expressly states that the dollar amount of the liability is to be determined as of the effective date of the employer's WRS participation. Further, the legislative history reflects that an employer's initial UAAL is determined and fixed as of the effective date of WRS participation, and the UAAL associated with a benefit enhancement is determined and fixed as of the effective date of the legislatively authorized determination. There are no provisions authorizing adjustments to the UAAL solely to reflect changes in actuarial assumptions. The only adjustment the ETFB is authorized to make to an employer's UAAL, once determined under paragraph (b), without further legislative authority, is to reflect the employer's recognition of additional creditable prior service under sec. 40.21(6), the accrual of interest and prepayments.

Based on the express language of paragraph (b) of sec. 40.05(2)(b), when considered alone and when compared to the language of paragraphs (a) and (am), and considering the legislative history of the UAAL funding provisions in chapter 40, my opinion is that the ETFB does not have authority to adjust the balance of the UAALs when the actuary recommends changes in the actuarial assumptions that were used to develop the initial UAAL balance. Such an adjustment must be authorized by the legislature.

Respectfully submitted,

/s/ L. Jane Hamblen
L. JANE HAMBLEN
Assistant Attorney General
State Bar No. 1027099

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[11] See, sec. 66.905 and 66.915, 1953 Stats. See also, Columbia Co. v. Wisconsin Retirement Fund, 17 Wis. 2d 310, 116 N.W.2d 142 (1962).

APPENDIX M

SUPREME COURT OF WISCONSIN
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May 5, 2000

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RE: Wisconsin Professional Police Association, Inc. et al. v. Lightbourn, et al., No. 99-3297-0A

Dear Counsel:

The court has considered the Findings of Fact filed in April and has raised several matters which require clarification from the parties.

The February 10 order indicated the court's concern with whether there was a factual dispute over the actuarial soundness of the subject legislation. Paragraph 54 on page 19 of the Stipulation of Facts appears to somewhat address this but does not contain a specific statement that the parties agree that the Trust Fund, as changed by the subject legislation, will be actuarially sound. The court would like the parties to address this matter and specifically state whether or not this is a point in dispute.

Further, the Stipulation of Facts does not contain a statement that there are no additional material facts in dispute. Once again, the court would like the parties to specifically address this point.

Finally, the court would like the parties to indicate whether they intend that the Stipulation of Facts supersedes any assertions/denials set forth in the pleadings.

The parties are to file separate responses to these matters in letter form by May 15th. Please call me if you have any questions.

Sincerely,

/s/ Cornelia G. Clark
CORNELIA G. CLARK
Clerk of Supreme Court

CGC/kh

cc: Hon. Michael J. Barron

APPENDIX N

May 15, 2000

VIA HAND DELIVERY
Ms. Cornelia G. Clark
Clerk of the Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: Wisconsin Professional Police Association, Inc. et al. v. Lightbourn, et al. , No. 99-3297-OA

Dear Ms. Clark:

This letter is written in response to your letter dated May 5, 2000 and on behalf of the SEA Petitioners in the above-captioned matter. Your letter contains three inquiries with respect to the Stipulation of Facts submitted by the parties to the Court:

i. Will the Trust Fund , as changed by AB 495 be "actuarially sound?"

There were some concerns about the definition and scope of the term "actuarially sound." The parties worked out a stipulation that provided all the factual elements that they believed were needed to make their respective legal arguments and this is reflected in the Stipulation of Facts previously submitted. SEA's position on this point cannot be adequately answered with a "yes" or "no".

The SEA Petitioners do not take the position that the provisions of AB 495, in and of themselves, leave the Trust in a financially troubled condition, now or in the future.

Notwithstanding this statement, the SEA Petitioners believe, and intend to argue, that AB 495 poses a systemic threat to the Trust Fund. If Trust Fund assets may be used to meet non-trust obligations, then the substantial assets of the Trust Fund are at risk for future legislative conversions that could threaten the solvency and actuarial soundness of the Trust Fund. The very ability to remove dollars from the Trust Fund either directly or indirectly, for purposes other than paying benefit commitments associated with those funds poses a significant danger to the future and security of the Trust Fund. Whether this concern fits within the parameters of the term "actuarial soundness" can perhaps be argued, but SEA is concerned about stipulating to the use of a term without a clear definition of what that terms may mean under Wisconsin law.

SEA Petitioners do not believe that the proper test under a takings analysis can be whether the Trust Fund remains able to meet its benefit commitments to Participants after a particular taking. Participants have a vested interest in their retirement system that extends to the WRS as a whole. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888 (1996). An improper taking from the Trust Fund does not become legally appropriate if sufficient funds remain to pay the obligations and benefit commitments of the Trust Fund. Using the Trust Fund as a ready source of cash to meet the State's budgetary cash flow needs or as a fund from which employers are

free to drain existing cash reserves is constitutionally flawed without regard to whether the remaining funds are sufficient to meet benefit commitments.

2. Are there any additional material facts in dispute?

The SEA Petitioners do not believe that there are any additional material facts in dispute. Petitioners believe that all facts necessary to the Court's consideration of this matter are contained in the Stipulation of Facts, the Stipulated Exhibits, and the admissions in the pleadings herein.

3. Does the Stipulation of Facts supercede any assertions/denials set forth in the Pleadings?

It is the understanding of the SEA Petitioners that the Facts admitted in the pleadings remain admitted. While SEA does not believe that there are any inconsistencies between such admissions and the Stipulated Facts, SEA takes the position that to the extent that there may be such inconsistencies, the Stipulation of Facts would supercede such admissions in the pleadings.

Denials contained in the pleadings are either adequately addressed in the Stipulation of Facts and stipulated exhibits to the extent necessary for the parties to make their legal arguments, or are not considered by the parties to be material for purpose of this action.

The parties have also agreed to a number of stipulations that are conclusions of law. The legal conclusions stipulated by the parties are intended solely to narrow the legal issues before this court, and are not intended to limit the legal arguments that may be made by any party to these proceedings.

SEA fully understands that the Court is not bound by stipulations that constitute conclusions of law.

Respectfully submitted,

HAUS, RESNICK and ROMAN, LLP

s/William Haus
WILLIAM HAUS and
Michael E. Banks

WH:amn
cc: Honorable Michael J. Barron
Attorneys Lester A. Pines, Carol Grob and Tamara Packard
Attorney Ann Ustad Smith
Attorneys Anthony L. Sheehan, Lucy T. Brown, and Michael J. Van Sistine
Attorneys Thomas M. Pyper and Theresa M. Hottenroth
Attorney Bruce F. Ehlke

APPENDIX O

EXCERPT OF SEA PETITIONER'S BRIEF
(Dated July 6, 2000)

A. The 200 Million Dollar Credit Account Is an Unlawful Use of the Assets of the WRS, Violates the WRS Contract, and Constitutes a Taking of Participants' Property Rights Without Just Compensation and Without Due Process in Violation of Article I, Section 13 of the Wisconsin Constitution and Amendments 5 and 14 of the U.S. Constitution

Article I. § 13 of the Wisconsin Constitution provides as follows:

> The property of no person shall be taken for public use without just compensation therefore.

This proscription is echoed by the Fifth and Fourteenth Amendments to the United States Constitution, which provide as follows:

> ...nor shall private property be taken for public use, without just compensation.
>
> ***
>
> ...nor shall any State deprive any person of ... property, without due process of law

The employer credit account provisions of Act 11 takes WRS participants' private property interest in the earnings of the Trust Fund and uses those earnings for a purpose not authorized by the trust--to pay for unfunded prior service liabilities and current service contribution requirements on behalf of participating employers who have no interest in the assets or earnings of the WRS. The Funds taken are used for a "public purpose" because the reduction in Employer obligations to the Trust Fund inures to the benefit of the public; either through

lower taxes, or the availability of additional funds for other public purposes.[1] Required payments that are suspended on the basis of "credit" dollars being available result in a direct and immediate reduction in budget requirements for participating employers with a direct diminution of Trust Fund assets.

1. WRS Participants Have a Constitutionally Protected Property Interest in the Assets and Earnings of the WRS.

In a takings analysis, the first question is whether a property interest exists. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis.2d 1, 18, 558 N.W.2d 83, 90 (1997). The Wisconsin Supreme Court has held that WRS participants have a vested property interest in all the assets and earnings of the WRS. Participants have "a property interest in [their] retirement system as a whole." *Id.* at 19., Association of State Prosecutors v. Milwaukee County, 199 Wis.2d 549, 558, 544 N.W.2d 888, 892 (1996). "The earnings on investments ... constitute assets of the [retirement] system.... The right [in the retirement system] includes the proper use of the earnings.... [T]he legislature ... [is] not free to spend or appropriate the earnings of the fund except in a manner authorized by statute relating to the ... retirement system." State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 10, 106 N.W.2d 301 (1960), *quoted with approval in* Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis.2d at 19, and Ass'n of State

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[1]Each of the provisions of Act 11 challenged herein violate the WRS Contract, as contained in chapter 40. Therefore, each of the challenged portions of Act 11 would also constitute an impairment of contract in violation of Article I, section 2 of the Wisconsin Constitution and Article I, section 10, clause 1 of the U.S. Constitution. This Court has held that participants' contract rights in the WRS constitute a vested property right, and has consistently analyzed violations of the WRS contract under the "takings" provisions of the Wisconsin and U.S. Constitutions -- essentially treating the "impairment" and "takings" causes of action as merged for purposes of analyzing violations of the WRS contract. Therefore, this brief will focus on the "takings" analysis that has been used by this Court in analyzing past violations of the WRS contract. It should be noted, however, that the same analysis would lead to the conclusion that the provisions of Act 11 challenged herein also violate the state and federal constitutional prohibitions against the impairment of contracts.

Prosecutors, 199 Wis.2d at 559.

2. The Employer Credit Account Provisions of Act 11 Takes the Property Rights of WRS Participants

When a property interest exists, the next question in the takings analysis is whether the property right has been taken. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis.2d 1, 20, 558 N.W.2d 83, 91 (1997). The employer credit account provision of Act 11 "takes" participants' property interest in having the assets and earnings of the Trust Fund used solely for purposes of satisfying benefit commitments to WRS participants, and having investment gains distributed in the manner prescribed by chapter 40. Absent the provisions of Act 11, § 27(1)(a) and (b)1, the current recognition of $4 billion from the TAA would not result in $200 million being applied as a "credit" toward required payments due from participating employers for unfunded liability or current contributions. Instead, the $200 million would be part of the total balance of the employer reserve considered by the actuary as one of several factors to determine contribution rates, and would be used to purchase annuities for WRS annuitants. Stip. ¶ 59, P. App. 21.

Actuary Brian Murphy, of the firm, Gabriel, Roeder and Smith, the WRS actuary, estimates (based upon the same data and assumptions used to prepare the actuary's November, 1999 report included in the record as Exhibit 13) that if the $200 million transferred into the employer accumulation reserve and earmarked for the exclusive purpose of an employer credit account by Act 11 were not so reserved, these funds would reduce the required contribution percentage rates which would be effective as of January 1, 2001 for each category of WRS employe by the following:

General category employes	0.02%
Elected officials and executives	0.03%
Protectives with Social Security	0.03%
Protectives without Social Security	0.04%

Since no change in contribution rates will actually occur

unless the change is at least 0.2%, the $200 Million, if left in the employer reserve, would have had no impact on current employer contribution rates.[2] Stip. ¶ 60, P. App. 21-22. The credit account, however, clearly reduces Trust Fund assets, and will have a very substantial and immediate benefit for participating employers. According to the DETF's preliminary calculations, the $200 million credit will have the following effect on each category of participating employer: [TABLE REPRINTED IN APPENDIX R]

Stip. ¶ 58, P. App. 21.

Thus, for example, while State employers' current contribution rates would not be reduced as a result of the $200 Million reserved for the credit account being included in the employer reserve and used in the manner prescribed by statute, using the credit account to pay the State employers' obligations for unfunded liability will result in State employers being relieved from such unfunded liability payments for an average of 22.1 months. This represents an aggregate savings to State employers of approximately 56.3 million dollars -- an amount which State employers would otherwise have an absolute obligation to pay into the WRS over the next 22.1 months, and which would otherwise end up in the employer accumulation reserve to fund annuities for WRS participants.

Clearly, the $200 Million employer credit account provides a benefit solely to participating employers, by making employer required payments for unfunded liabilities and/or current service contribution requirements on behalf of participating employers until the credit is exhausted. On average, each participating employer's share of the $200 Million credit account relieves employers from their required payments for between 19.6 and 58.2 months. Stip. ¶ 58, P. App. 20-21.

There is no legitimate trust purpose being served by the

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[2]Changes too small to be implemented are deferred and affect the next evaluation of contribution rates.

employer credit account. The assets of the Trust Fund may only be used to fulfill benefit commitments to WRS participants, as set forth in chapter 40, and "shall not be used for any other purpose." Stip. ¶ 3, P. App. 2-3, § 40.01(2), Stats. Chapter 40 provides (1) that employer payments for unfunded liability are to be amortized over 40 years; (2)that such payments for unfunded liability must be made until the employer's liability is paid in full; and (3) that employers may pay contributions for unfunded liability in advance. Stip. ¶ 32, P. App. 13-14, §§ 40.05(2)(b),(bg), bm), Stats. Nowhere does chapter 40 authorize the use of assets of the Trust Fund to pay or defer employer required contributions for unfunded liabilities or current service contributions, and the use of Trust Funds in this manner does not satisfy the requirement that Trust Funds be used solely to satisfy benefit commitments to WRS participants. As stated by this Court "the state cannot simply reach into the [Trust Fund] to pay for obligations it has incurred." Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 563, 544 N.W.2d 888, 893 (1996).

In their answer to the Complaint herein, Respondents George Lightbourn, Secretary of the Wisconsin Department of Administration, and Jack C. Voight, State Treasurer (collectively, the "Administration Respondents") took the position that (1)since the $200 Million credit is funded with earnings on employer contributions, participants do not have a property interest and contract right in the $200 Million used to finance the credit account; and (2)that since employer contributions are based on the amount necessary to make up any deficiency in funding the WRS not provided by the combination of projected employee contributions on existing monies in the Trust Fund, and earnings on existing monies in the Trust Fund, that over time the employers will end up having the same contribution requirements whether it takes the credit up front, as provided in Act 11, or the $200 Million is used in the calculation of future required employer contributions. Administration Respondents Answer, ¶43, P. App. 17. Each of these contentions is flawed, and will be addressed in turn.

i. Employer Contributions and the Earnings on Employer Contributions

must Be Used Solely for Purposes of Satisfying Benefit Commitments to WRS Participants; There Is No Basis in the Law for the Position That Participating Employers Retain Any Right or Beneficial Interest in Any of the Assets or Earnings of the Trust Fund.

Participants have a vested property interest and contract right in all the assets and earnings of the Trust Fund. Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis.2d 1, 18, 558 N.W.2d 83, 90 (1997). The vested property interest and contract right held by participants includes an interest in all monies contributed to the Trust Fund by participating employers, and the earnings on all such employer contributions. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 559-60, 544 N.W.2d 888, 892 (1996), *see, also,* State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 10, 106 N.W.2d 301, 305 (1960)(employer and employee contributions, and the earnings thereon, are assets of the retirement system in which beneficiaries have a vested property interest). There is no basis in the law for Respondents' assertion that participants lack a vested property interest in Trust Fund assets derived from the investment of mandatory employer contributions -- such assets were contributed to the Trust Fund for the sole benefit of participants, belong solely to participants, and are invested in the same manner as all other Trust Fund assets. *Id.,* § 40.04(3), Stats. The mere title of the account or the source of the monies in the account does not affect the vested property interest of participants.

The assets in the employer accumulation reserve can only be used for the purposes specifically authorized by section 40.04, Stats., and these purposes are limited to paying benefits to participants. Nothing in chapter 40 provides that Employers retain any right or beneficial interest in their contributions to the Trust Fund or the assets or earnings contained in any of the Trust Fund's accounts or reserves. *See,* §§ 40.04(5) and 40.05(2) Stats. "Contributions placed in the [employer] accumulation reserve are [to be] applied solely to the payment of fixed monthly annuities [to participants]..." Association of State

Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 556, 544 N.W.2d 888, 890 (1996). In the absence of specific provisions reserving for participating employers rights and/or beneficial interests in employer contributions to the Trust Fund, no such rights or beneficial interests exist, and none can be imposed by the legislature. *See e.g.* Findorff v. Findorff, 3 Wis. 2d 215, 88 N.W.2d 327 (1958)(Where no right to revoke trust is expressly reserved by trust agreement creating trust, trust is irrevocable), Upham V. Plankinton, 152 Wis. 275, 140 N.W. 5 (1913)(The Legislature cannot legitimately abrogate the right to have a trust carried out in accordance with the terms of the trust), 76 Am Jur 2d, Trusts § 322 (Trusts are to be administered in accordance with the terms of the trust, and neither a court, nor a beneficiary, nor the legislature has the authority to modify or abrogate the terms of a trust.), *See, also,* State Engineering Association v. Employe Trust Funds Board, 207 Wis.2d 1, 19, 558 N.W.2d 83, 91 (1997)("The legislature [cannot]... spend or appropriate the earnings of the fund [(the Trust Fund])except in a manner authorized by statute relating to the ... retirement system.).[3]

Once employer contributions are deposited in the Trust Fund, they are no different from any other asset of the Trust Fund, and must be used "solely for the purpose of ensuring ... the fulfillment of the benefit commitments to participants." "Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan...." § 40.01(2), Wis. Stats. Nothing in chapter 40 authorizes participating employers to use or borrow trust assets for purposes of paying required employer contributions for current or unfunded prior service liabilities. "The legislature and the plaintiff board are not free to spend or appropriate earnings of the fund except in a manner authorized by statute

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[3]There is authority that courts may allow deviation from trust terms to deal with emergencies or unanticipated events that threaten the trust and would interfere with the ultimate purpose of the trust. *See, generally,* 76 Am Jur 2d, Trusts § 335. This Court has expressly recognized such a narrow exception with respect to the Trust Fund. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 563-64, 544 N.W.2d 888, 892 (1996). In the present action, the Parties have stipulated that no such emergencies or threats to the Trust Fund exist. Stip. ¶ 54, P. App. 19.

relating to the [Wisconsin] retirement system." Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 559, 544 N.W.2d 888, 892 (1996). "Unless the appropriation for expenditures of money belonging to the retirement system, whether principal or earnings and regardless of the accounting method which reflects their existence, comes within the purposes of the statutes relating to the ... retirement system, such an appropriation cannot be held valid." State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 11, 106 N.W.2d 305 (1960) The employer credit account provisions of Act 11 are not authorized by chapter 40, and deprive participants of their vested property interest and contract right to have the assets and earnings of the Trust Fund used strictly in accordance with the terms of the trust created by Chapter 40.

ii. The Contention That Employers Retain Any Right or Beneficial Interest in Their Contributions to the Trust Fund Is Plainly Inconsistent with the Chapter 40 Requirement That the WRS Be Administered as a Qualified Plan under the Internal Revenue Code.

The fact that Employers retain no right or beneficial interest in their contributions to the Trust Fund, and cannot use employer contributions for purposes other than paying benefit commitments to WRS participants, is further confirmed by §40.015, Stats. which provides as follows:

40.015. Compliance with federal tax laws.

(1) The Wisconsin retirement system is established as a governmental plan and as a qualified plan for federal income tax purposes under the internal revenue code and shall be so maintained and administered.

(2) No benefit plan authorized under this chapter may be

> administered in a manner which violates an internal revenue code provision that authorizes or regulates that benefit plan or which would cause an otherwise tax exempt benefit to become taxable under the internal revenue code.

Under the Internal Revenue Code, the eligibility requirements for qualified plans are contained in 26 USCA 401(a), which provides in relevant part as follows:

> (a) Requirements for qualification. A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section
>
> ***
>
> (2) **if under the trust instrument it is impossible**, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, **for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries** ...
>
> (emphasis added).

Since the WRS is statutorily required to be administered as a qualified plan, it must be impossible under the terms of chapter 40 "for any part of the corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of [participating] employees or their beneficiaries." Act 11 clearly violates this proscription by diverting and using assets of the Trust Fund for the purpose of paying employer required contributions -- a purpose that is not for the benefit of

participating employees or their beneficiaries.[4]

iii. Any Future Shortfall Created by Virtue of Using $200 Million Contained in the Employer Accumulation Reserve to Pay Contribution Requirements on Behalf of Participating Employers Will Not Be Made up by Participating Employers Alone, but Rather, Will Be Shared Equally by Participating Employers and Participating Employees.

The Administration Respondents' contend that any shortfall in the Trust Fund that may eventually result from the use of $200 million in the Employer Reserve to fund a contribution credit for participating employers will be made up by participating employers in the form of increased contributions. Therefore, the Administration Respondents assert, any risks to the Trust Fund associated with taking a present $200 Million credit are born solely by participating employers. This contention is inaccurate.

Since 1989, § 40.05(2n), Stats. has provided that when an increase or decrease in contribution rates is necessary to maintain the financial balance of the WRS, any such change is to be apportioned **equally** between the employer-required contribution rate and the benefit adjustment contribution rate paid by participating employees. Stip. ¶ 26, P. App. 11. Thus, any subsequent increase(s) in contribution rates will be split

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[4]When a plan is qualified, Employers can deposit their contributions in a trust on behalf of employees and take a current deduction for the amount of the contribution, and employees are not taxed on contributions to the trust made by employees or on their behalf, or the earnings thereon, until such contributions and earnings are withdrawn at retirement. Since the governmental entities that participate in the WRS are not subject to federal taxes anyway, the loss of qualification is one born solely by participating employees who will be required to pay, currently, federal income taxes for all contributions and earnings thereon. The risk of losing qualified status under the Internal Revenue Code for the WRS is borne directly by participating employees who are the only ones who have anything to lose if the WRS' qualified status is lost.

evenly between employers and employees, and 50% of the risk that the $200 Million credit will cause a shortfall at some point in the future rests with participating employees who will share equally in any increase(s) in contribution requirements, and who reap absolutely no benefit from the employer credit account. In effect, the $200 Million is removed from the Employer Reserve, utilized solely by employers, and to the extent this causes or contributes to a necessary increase in contribution rates, participants will have to pay 50% of that increase.

It should be noted that the shared risk associated with the $200 Million credit is not limited to circumstances where there are increases in contribution rates. Any decrease in contribution rates that would be attributable (in whole or in part) to the $200 Million having remained in the Employer Accumulation Reserve (and earnings thereon) instead of being consumed as a credit pursuant to Act 11, would be a savings shared equally with participating employees. Thus the cost of the credit is being shifted, in part, to participating employees. *See,* R. 13 at 7, P. App. 85 ("Funds used to pay for new benefits [under Act 11] would otherwise have been available to reduce contribution rates...")

iv. It Is Disingenuous to Assert That the Trust Fund Is Equally Secure with an I.O.U. from Participating Employers in Place of Existing Cash Reserves; an I.O.U from Participating Employers Is Not the Equivalent of Cash Reserves

Even to the extent that participating employers bear a portion of the responsibility for making up any shortfall that may result from the $200 Million credit through subsequent increases in Employer Contributions, no weight should be given to any contention that this fact somehow mitigates the taking caused by the employer credit account provisions of Act 11. A $200 Million I.O.U. to be contingently paid back at some undefined point in the future is not the equivalent of $200 Million in cash. The Trust Fund is more secure with cash reserves than it is when such reserves are replaced with a promise of repayment -- this is true without regard to the

identity of the creditor. Indeed, this is the fundamental difference between a funded retirement system, such as the WRS, and an unfunded "pay as you go" retirement system. There is no legal basis for the argument that a state government can convert funds belonging to private citizens for public use and that such a conversion would not constitute a taking so long as the state promises to repay the funds in the future; any such contention should be summarily rejected.

Allowing the "credit" stratagem or device to provide access to Trust Funds would expose all assets of the Employer Reserve to being a source of credit for participating employers and the conversion of the WRS to an unfunded system. There is no principled distinction between the employer credit provisions of Act 11, and a future legislative Act that uses the entire balance of the Employer Reserve to pay current non-trust obligations on behalf of the state or other participating employers. Furthermore, since there is no legal basis for distinguishing between the assets contained in the Employer Reserve, and the assets contained in the other reserves and accounts in the Trust Fund, if the conversion of Trust Fund assets under Act 11 is permissible, then the assets of all of the accounts and reserves in the Trust Fund may be similarly diverted to meet whatever non-trust obligations the state legislature deems appropriate.

v. The Impact of Act 11 on the Actuarial Soundness of the Trust Fund Is Irrelevant in a Takings Analysis; Legislative Intervention into the Trust Fund Is Only Permissible When Necessary to Preserve the Actuarial Soundness of the Trust Fund or to Salvage Financially Troubled Funds.

Throughout the preliminary stages of these proceedings, Respondents have focused on the question of whether the provisions of Act 11 threaten the actuarial soundness of the Trust Fund. It is respectfully submitted that the answer this question is irrelevant to the outcome of the present action. In Association of State Prosecutors v. Milwaukee County, 199

Wis. 2d 549, 561, 544 N.W.2d 888, 893 (1996), the Respondent argued that since the retirement plan assets affected by the challenged legislation "make up less than one third of one percent of the [] Plan's net assets" that the subject legislation would not diminish or "take" the benefits of plan participants. In rejecting this argument, this Court stated as follows:

> Governmental takings do not become exempt from due process requirements simply because they may be actuarially insignificant. ... The gravity of a property deprivation is irrelevant to the question of whether such rights are violated without due process. ... Any pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible. ... While the specific transfer of trust funds ... may not immediately threaten the benefits of vested ... beneficiaries, the precedent set by such a transfer certainly could.

Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 561-62, 544 N.W.2d 888, 893 (1996)(emphasis added).

The proper question in a takings analysis is whether a recognized private property right has been taken for a public purpose without just compensation and due process of law. If the provisions of Act 11 result in the use of the assets of the Trust Fund for non-trust purposes -- such as using the Trust Fund as a source of ready cash to meet the State's budgetary cash flow needs (as a source of cash or credit) or as a fund from which employers are free to drain existing cash reserves -- then the legislation is unconstitutional without regard to whether the Trust Fund remains actuarially sound after implementation of Act 11. *Id.* The fact that the Trust Fund may continue to be able to meet its benefit commitments after a taking has occurred is irrelevant. *Id.* This Court has consistently held that Legislation which takes the private property interest of vested beneficiaries without due process of law is invalid without

regard to the actuarial significance of the taking. *Id.* At 565, *see, also,* State Teachers' Retirement Board v. Giessel, 12 Wis.2d 5, 10, 106 N.W.2d 301 (1960)(Legislation authorizing expenditure of $18,737.14 to fund a study of retirement systems was not within purpose of retirement system and was invalid; the legislation's impact on the actuarial soundness of the Trust Fund played no part in this Court's decision); Retired Teachers Ass'n v. The Employe Trust Funds Bd., 207 Wis. 2d 1, 558 N.W.2d 83 (1997) (Legislation which used approximately $82 million in WRS assets to pay general purpose revenue obligations of the state for supplemental benefits takes the property of WRS participants without just compensation and is invalid; the legislation's impact on the actuarial soundness of the Trust Fund played no part in this Court's decision).

Asking whether the Trust Fund remains actuarially sound after the implementation of Act 11 misstates the issue. This Court has adopted the rule -- much like that adopted in other states -- that prohibits legislative intervention into the Trust Fund except in circumstances where such intervention is "necessary to preserve the actuarial soundness of [the] plan or to salvage financially troubled funds." *Id.* at 563, *see also,* Spina v. Consolidated Police and Firemen's Fund, 41 N.J. 391, 197 A.2d 169, 176 (1969)(allowing legislative intervention into the employee retirement fund when the plan was unable to meet its present and future benefit commitments), 60A Am Jur 2d, Pension and Retirement Funds § 1623. As stated by this Court in invalidating the legislation at issue in Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996):

> In the present case, the County Plan was neither insolvent nor in fiscal distress. The purpose of Wis. Stat. § 978.12(5)(c)5 was not to improve the actuarial soundness of the pension plan... This case does not present one of those situations in which legislative intervention may be needed.

All legislation which modifies the WRS and deprives participants of their vested property rights is invalid *unless* such intervention is needed and necessary to preserve the actuarial

soundness of the Trust Fund. The parties have stipulated that the Trust Fund is not financially troubled, and the provisions of Act 11 are not needed or necessary to protect the actuarial soundness of the Trust Fund or to salvage the Trust Fund. Stip. ¶ 54, P. App. 19. It is respectfully submitted that the legislation at issue does not come within the narrow exception permitting legislative intervention into the Trust Fund.

vi. The Taking at Issue Poses a Systemic Threat to the Solvency and Actuarial Soundness of the Trust Fund

The SEA Petitioners do not contend that the provisions of Act 11, in and of themselves, leave the Trust Fund in a financially troubled condition. Act 11, however, does pose a systemic threat to the Trust Fund. If Trust Fund assets may be used to meet non-trust obligations, then the substantial assets of the Trust Fund are at risk for future legislative conversions that could threaten the solvency and actuarial soundness of the Trust Fund. The very ability to remove dollars from the Trust Fund, either directly or indirectly, for purposes other than paying benefit commitments associated with those funds, poses a significant danger to the future security of the Trust Fund.

In invalidating legislative enactments that utilize assets of a pension system in a manner not authorized by the plan, this Court has specifically recognized the systemic threat that such legislation poses to a pension system. "While the specific transfer of trust funds ... may not immediately threaten the benefits of vested ... beneficiaries, the precedent set by such a transfer certainly could." Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996)(emphasis added). If such legislative grabs at the assets of a public pension system are permissible, "the actuarial soundness of the plan could eventually suffer." *Id.* at 562. The systemic threats that Act 11 poses to the pension system are duly noted in the Joint Survey Committee Report on Assembly Bill 495, which is attached as an Appendix to Assembly Bill 495:

> [U]sing accumulated capital gains from the Transaction Amortization Account to finance part of this benefit increase legislation [] would seriously reduce the TAA and weaken its effectiveness for the retirement system as a buffer against economic adversity. And history has repeatedly taught us that bad times do follow good.

P. App. 93.

This Court should continue to be unwavering in its holdings concerning the use of WRS assets and modifications to the WRS contract. WRS assets may only be used in strict accordance with the terms of chapter 40, and legislative intervention into the fund is only constitutional when such intervention is necessary to preserve the actuarial soundness of the Trust Fund. By adhering to these clear bright line rules, the integrity of the Trust Fund can be preserved and the vested property rights of participants can be protected.

APPENDIX P

EXCERPTS FROM WISCONSIN RETIREMENT SYSTEM (Information Paper #73, January 1999)

The full implementation of the pension funds merger mandated by Chapter 280, Laws of 1975, was finally achieved with the enactment of Chapter 96, Laws of 1981. The act restructured the three pension fund boards into a Wisconsin Retirement Board and a Teachers Retirement Board (consolidated from the State Teachers Retirement Board and the Milwaukee Teachers Retirement Board) defined the program responsibilities of each of those boards in relationship to the ETF Board, and, in order to reflect these changes, merged and recodified the statutes related to public employe pensions. In effect, with the enactment of Chapter 96, approximately 90% of all public employes in Wisconsin were now all under one pension system. The only public employes not affected by the merger were those in the independent, nonteacher Milwaukee pension systems and those enrolled in a few small non-WRS affiliated independent municipal pension systems.

Table 1.

Employer Participation by Employer Category (December 31, 1977

Employer Category	Participating Number of Employers
State Agencies*	59
Counties	71
Cities	187
Towns	134
Villages	182
School Districts	426
Technical College Districts	16
CESA's	12
Other	143
TOTAL	**1,230**

*Each state agency is counted as a separate employer.

SEE APPENDIX Q FOR TABLE 2.

APPENDIX Q

TABLE 2: Total Number of Active Employe Participants by Employment Category

End of Calendar Year	General		Elected		Protective with SS		Protective without SS		Total
	Number	%	Number	%	Number	%	Number	%	
1998	185,161	92.83%	1,289	0.65%	10,398	5.21%	2,606	1.31%	199.434
1989	190,000	92.92	1,291	0.63	10,589	5.18	2,590	1.27	204,470
1990	198,322	92.96	1,221	0.59	11,195	5.25	2,604	1.22	213,342
1991	204,188	92.95	1,218	0.55	11,694	5.32	2,586	1.18	219,686
1992	209,519	92.81	1,453	0.64	12,161	5.39	2,628	1.14	225,761
1993	212,839	92.80	1,459	0.64	12,435	5.42	2,627	1.16	229,360
1994	216,654	92.72	1,474	0.63	12,899	5.52	2,639	1.13	233,666
1995	218,579	92.51	1,488	0.63	13,563	5.74	2,644	1.12	236,274
1996	221,637	92.49	1,469	0.61	13,895	5.80	2,634	1.10	239,635
1997	225,427	92.42	1,478	0.61	14,334	5.88	2,673	1.10	243,912

APPENDIX R

Wisconsin Retirement System Fixed Fund Reserve Balances

Year	Employer	Employe	Annuity	Undistributed Earnings	TAA Balance	Total
1990	4,692,432,233.98	4,806,043,253.77	6,298,935,353.11	97,618,279.84	1,059,472,047.00	16,954,501,167.70
1991	5,261,933,506.58	5,416,798,155.81	6,999,079,894.14	11,509,729.52	2,805,568,995.00	20,494,690,281.05
1992	5,888,378,956.71	5,958,878,678.18	7,640,804,524.18	18,035,544.09	2,978,367,346.00	22,484,465,051.16
1993	6,487,205,301.87	6,568,701,621.70	8,513,590,943.05	5,815,196.76	4,312,893,265.00	25,888,206,328.38
1994	6,924,270,977.55	7,053,420,130.89	9,171,260,220.52	12,891,428.13	2,444,358,758.00	25,606,201,513.09
1995	7,660,017,749.45	7,705,142,378.81	10,220,462,967.77	21,951,128.97	5,892,050,688.00	31,499,624,913.00
1996	8,611,146,411.10	8,412,078,621.18	11,564,058,129.21	734,513.73	7,405,067,577.00	35,993,105,252.22
1997	9,802,763,082.58	9,435,407,713.32	13,053,198,098.20	7,628,270.13	9,800,688,989.00	42,099,688,151.23
1998	11,499,288,736.30	9,987,724,653.81	14,814,357,200.58	11,433,624.91	11,494,770,960.00	47,807,575,175.60
1999 pre-liminary	13,435,380,598.96	10,962,298,421.72	16,496,442,528.36	32,068,006.50	13,910,154,943.00	54,836,344,498.54

Source: DETF; the figures for years 1990 to 1997 are also reflected in Wisconsin

APPENDIX S

Estimated Required Payments and Credits for Unfunded Liabilities (based on 12/31/1998)

	A	B	C	D	E	F	G
Employer Unit	Number of Units	Covered Payroll (in millions)	Unfunded Liabilities Req'd Contribs. per year (in millions)	Share of $200 Million Credit (in millions)	% Share of $200 Million Credit	Total Unfunded Liabilities (in millions)	Paydown of Credit (in millions)
State	59	2,386.0	30.6	56.3	28.1%	661.5	22.1
Cities	187	843.3	10.1	20.2	10.1%	244.4	24.0
Villages	185	109.1	1.1	2.6	1.3%	23.1	28.1
Special Districts	152	82.2	0.4	1.9	1.0%	7.4	58.2
Town	144	34.2	0.3	0.8	0.4%	4.9	32.9
Counties	71	1,048.6	13.0	24.7	12.4%	259.5	22.8
School Districts	426	3,560.9	51.4	84.0	41.9%	905.1	19.6
Tech Colleges	16	361.7	3.7	8.5	4.3%	74.5	27.7
CESA	12	50.6	0.7	1.2	0.6%	10.0	20.5
TOTAL	1,252	8,476.6	111.3	200	100 %	2,190.4	

Note: Each employer's credit balance (Column E) would be applied to the annual required unfunded liabilities contribution (Column C). This required unfunded liabilities contribution represents a percentage of covered payroll which varies widely among WRS employers. Interest liabilities would continue to accrue during the credit period and add to the outstanding unfunded liabilities (Column F). Credit periods indicated are averages within each WRS employer group; as shown, these too vary by individual employer.

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IN THE

Supreme Court of the United States

STATE ENGINEERING ASSOCIATION, *et al.*,
Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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BRIEF FOR RESPONDENT WISCONSIN EDUCATION ASSOCIATION COUNCIL IN OPPOSITION

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QUESTION PRESENTED

Whether the Wisconsin Supreme Court erred in construing the Wisconsin statutes that establish and govern the Wisconsin Retirement System as permitting the Wisconsin Legislature to enact a law that, for a limited period of time, treats a designated portion of the assets in the trust as a credit against future employer contributions, where that arrangement neither reduces the benefits of any participant nor takes any assets from the System, and where the decision to adopt the credit arrangement was based on the fact that trust assets had increased so dramatically that adopting the credit would not affect the actuarial soundness of the trust.

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IN THE

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No. 01-638

STATE ENGINEERING ASSOCIATION, *et al.*,
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On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENT WISCONSIN EDUCATION ASSOCIATION COUNCIL IN OPPOSITION

STATEMENT

A. The Wisconsin Retirement System

The Wisconsin Retirement System ("WRS") provides retirement benefits for employees of state and local governments in Wisconsin, including public school teachers represented by respondent Wisconsin Education Association Council ("WEAC"). Appendix to Petition for Writ of Certiorari ("App.") 9-10, 116-119.

Retirement benefits provided by the WRS generally are determined by a "defined benefit" formula, under which a participant's credited service is multiplied by his or her final

average salary and, in turn, by a percentage multiplier. App. 20, 103-104. The WRS also includes a "defined contribution" money purchase plan which provides greater benefits for some participants than the defined benefit formula would yield. App. 21, 104.

To fund these benefits, contributions are made by or on behalf of each active employee, in amounts fixed by statute as a specified percentage of the employee's income. App. 10, 111. Virtually all of these "employee contributions" actually are made by state and local government employers on the employee's behalf. App. 10.

In addition, covered employers are required to make contributions at rates expressed as a percentage of total payroll. The contribution percentages for these employer contributions are not fixed by statute but are determined annually by actuarial analyses. App. 12-14, 112-113.

The monies received by the WRS are held in trust and allocated to several different accounts, of which three are relevant here. Employee contributions are held in the "employee accumulation reserve;" employer contributions are held in the "employer accumulation reserve;" and all gains and losses of all the trust accounts are initially allocated to the "transaction amortization account," or "TAA." App. 17-24, 104-110.

Under the statutory scheme as it stood in 1999, twenty percent of the TAA balance was distributed to the other accounts each year. Wis. Stat. § 40.04(3)(ab) (App. 150). (Prior to 1989, the annual distribution had been set at seven percent. App. 23, 108.) On two previous occasions, legislation was enacted providing for special one-time distributions from the TAA to the other accounts. App. 24, 108-109.

Wis. Stat. § 40.01(2) states that the WRS trust fund "shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment *at the lowest*

possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose." App. 142 (emphasis added).

Although rights exercised and benefits accrued by employees under the WRS are contractual in nature, Wis. Stat. § 40.19(1) specifically acknowledges and defines the right of the state to make various statutory changes in the WRS. That section provides as follows (App. 159):

> Rights exercised and benefits accrued to an employee under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

B. Act 11

As a result of successful investment experience, the TAA balance skyrocketed from under $2.5 billion in 1994 to nearly $14 billion in 1999. App. 110. In that year the Wisconsin legislature enacted Act 11, which made several changes in the WRS.

First, in a provision not challenged in this Court, Act 11 provides for a one-time distribution of $4 billion from the TAA to the other trust accounts. App. 29. As the Wisconsin Supreme Court characterized it, this was "a legitimate recognition of gains in the TAA, properly dispersed to those who are entitled to receive them." App. 64.

Second, Act 11 provides "substantial benefit improvements," *id.*, including significant increases in the monthly multipliers. App. 25-28.

Third, having added $1.236 billion to the employer reserve account as part of the $4 billion distribution from the TAA, App. 70, Act 11 provides that $200 million of that $1.236 billion increase will be treated as a credit against future contributions employers otherwise would be required to make. 1999 Wis. Act 11, § 27(1)(b)(1) (App. 71). *See* App. 29-30. This does *not* remove any funds from the trust. App. 77. Nor does it affect "the contractual benefit to be received by participants." App. 74.

"Nothing in Act 11 permits employers to back away from their obligation to pay accrued benefits." App. 75. Rather, the $200 million credit provides government employers with a short "respite from employer contributions," *id.*, in a manner that "do[es] not . . . threaten[ ] the security of the trust fund," *id.*, but merely allows the employers to forgo contributing money that "is not needed now, may not be needed in the future, and absolutely would have to be paid if ever it is needed," *id.*

Act 11 expressly provides that "the employee trust funds board shall retain authority to maintain proper actuarial funding of the Wisconsin retirement system." 1999 Wis. Act 11, § 27(3). The Wisconsin Supreme Court has construed this as "a fail-safe for the WRS that overrides all other provisions of Act 11." App. 79.

C. The Decision Below

Two public employee organizations—petitioner State Engineering Association and the Wisconsin Professional Police Association—brought an original action in the Supreme Court of Wisconsin challenging various provisions of Act 11 under state and federal law. Respondent WEAC—which also is a public employee organization, but

which believes that the provisions of Act 11 are beneficial to public employees and retirees—participated in the action as a respondent.

In addressing petitioners' challenges, the Wisconsin Supreme Court began by analyzing the provisions of the statutes governing the WRS that define the nature and limits of participants' legally protected interests in the retirement system. App. 49-57.

The Court found Wis. Stat. § 40.19(1), quoted *supra* at 3, to be particularly significant in that regard, because that provision speaks expressly to the question of legislative changes. App. 51-53. The Court held that "§ 40.19(1) requires a balancing of interests," App. 52-53, with participants enjoying "certain contractual rights that may not be abrogated by any subsequent legislative act," App. 53, but with the state free nevertheless to modify various "procedural or substantive aspect[s] of the WRS," *id.*

The Court also viewed Wis. Stat. § 40.01(2) as "requir[ing] some balancing of competing interests," App. 55, because that provision dictates that the purpose of the WRS is to "fulfill[ ] benefit commitments" at "the lowest possible cost," *id.*

The Court concluded that an interest in "the integrity and security" of retirement funds "is inherent in Wis. Stat. §§ 40.01 and 40.19." App. 57. But the Court did not view that statutorily-created interest as prohibiting changes in the retirement system that do not "threaten the actuarial soundness of the retirement fund," *id.*, and that are not "likely [to] result in nonpayment of or decrease in accrued benefits," *id.*

Applying those principles to petitioners' attack on the $200 million contribution credit, App. 70-81, the Wisconsin Court emphasized (i) that the credit (and for that matter, the size of the employer reserve balance) "is not relevant to a

participant's accrued retirement benefit" and "does not determine the contractual benefit to be received by participants," App. 74; (ii) that the credit does not affect in any way the obligation of employers to fulfill "their obligation to pay accrued benefits," App. 75; and (iii) that "no money is removed from the employer reserve" as a result of the credit, App. 77.

The Court examined each of the respects in which petitioners argued that the $200 million credit provision affected their interests, and concluded that none of them involves any legally protected right.

First, the Court observed that petitioners were claiming an interest not only in "the *fulfillment* of accrued benefits," App. 75 (emphasis added), but in "the *relative security* of accrued benefits," *id.* (emphasis added). The Court acknowledged that the trust fund might be somewhat "more secure" without the $200 million credit arrangement, App. 76, but the Court examined the Wisconsin statutes governing funding of the WRS and concluded that those statutes "do[ ] not demand absolute security," *id.* Because of that feature of the state statutes, and because petitioners conceded that Act 11 does not "threaten[ ] the security of the trust fund," App. 75, the Court concluded that petitioners' general interest in the security of the fund did not give rise to any property interest that had been taken from them by Act 11, App. 75-76, 79, nor to any contractual right that was impaired by the Act, App. 80-81. On the contrary, the Court pointed out that Act 11 specifically requires that "proper actuarial funding of the Wisconsin retirement system" be "maintain[ed]." App. 79.[1]

---

[1] While "admit[ting] that the provisions of Act 11, in and of themselves, do not leave the trust fund in a financially troubled condition," App. 81, petitioners argued in the court below that a decision upholding Act 11 would "serve as a dangerous precedent 'for future legislative [actions] that could threaten the solvency and actuarial soundness of the Trust Fund,'" *id.* Because such facts were not presented by this case, the

Second, the Court observed that petitioners were "claim-[ing] a right to maximize the chance for additional benefits in the future." App. 75. Specifically, "[petitioners] reason that the greater the balance in the employer reserve, the more likely it is that the legislature will vote to increase retirement benefits." App. 78. The Court found nothing in the Wisconsin statutes that gave petitioners a protected interested in such "speculative . . . possibilities for an increase in retirement benefits sometime in the future," *id.*—particularly in the face of § 40.01(2), which provides that the purpose of the WRS is "ensuring the fulfillment *at the lowest possible cost* of the benefit commitments to participants, as set forth in this chapter" (emphasis added). *See* App. 79 ("Speculation about how benefits might be increased in the future does not outweigh the legislature's right to amend the provisions of Chapter 40 to reduce employer costs on a temporary basis, provided the WRS remains secure.")

With respect to petitioners' impairment-of-contract claim, the Court placed particular emphasis on Wis. Stat. § 40.19(1), which expressly permits legislative modifications of the WRS, *see supra* at 3, and which the Court found to be "just as much a part of the contract as any other provision in Chapter 40." App. 80.

The Court also addressed respondents' argument that the $200 million credit might increase the possibility of a shortfall in the fund at some time in the future, which might result in employees being required to make greater contributions to the trust. App. 76-77. Noting that it was "not faced with these facts," App. 76, the Court stated that, "[s]hould employees as a class ever have to make contributions to the employer reserve, they may renew the argument that the balance in the fund would have been greater if there had been no employer credits," App. 77.

Wisconsin Court found no need to address "the specter of an extreme situation." *Id.*

The Wisconsin Supreme Court therefore concluded that the $200 million credit arrangement did not abridge any legally protected interest of the petitioners.

ARGUMENT

Petitioners posit a conflict among decisions of various state courts as to whether "the vested property and contract rights" of participants in a statutory public employee retirement system are "limited to their benefit commitments" or "extend to the assets and earnings contained in the . . . Trust Fund." Petition for Writ of Certiorari ("Pet.") at 15. Petitioners urge the Court to resolve this putative conflict in favor of the proposition "that participants have a vested interest in the underlying assets of their pension system," Pet. 16, rather than only a right "to satisfaction of their benefit commitments," Pet. 17.

For two reasons, this case does not provide a vehicle to decide the question petitioners propose.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT, BECAUSE IT RESTS ON THE WISCONSIN SUPREME COURT'S CONSTRUCTION OF STATE STATUTES THAT ARE UNIQUE TO WISCONSIN.

Petitioners acknowledge, as they must, that any "contractual and property rights" they may possess with respect to the WRS are "established by" the Wisconsin statutes governing the retirement system. Pet. 28-29. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) ("[w]here the claim is that the State's policy embodied in a statute is to bind its instrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract") (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104

(1938)); *Bishop v. Wood*, 426 U.S. 341, 344-345 (1976) (whether a property interest exists "must be decided by reference to state law," and "can be determined only by an examination of the particular statute or ordinance in question").

Consistent with these principles, the Wisconsin Supreme Court based its decision in this case on a construction of the relevant provisions of the Wisconsin statutes that establish and govern the WRS. Those provisions are unique to Wisconsin, and have no counterparts in the statutory schemes of the other jurisdictions whose caselaw petitioners cite. Consequently, there is no conflict for this Court to resolve.

1. As petitioners state, *see* Pet. 28, the provision that is most crucial to their claims is Wis. Stat. § 40.19(1), which addresses in terms the right of the state legislature to make modifications in the WRS. Section 40.19(1) (quoted *supra* at 3), is a complex provision which distinguishes certain rights that "shall not be abrogated by any subsequent legislative act" from other aspects of the WRS as to which "[t]he right of the state to amend or repeal, by enactment of statutory changes . . . is reserved by the state." The Wisconsin Supreme Court construed this provision as permitting the enactment of the $200 million credit at issue. App. 80. We believe the Court was correct in that regard. But whether correct or not, the decision rests squarely on the Wisconsin Court's interpretation of an unusual Wisconsin statutory provision containing language very different from the statutes involved in the cases from other jurisdictions petitioners have cited.

2. The Wisconsin Court also relied on Wis. Stat. § 40.01(2), which provides that the purpose of the WRS trust fund is "ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter." The Court found the $200 million credit to be "in conformity with Wis. Stat. § 40.01(2)." App. 80-81. None of

the other cases petitioners cite involved retirement systems which expressly provide for a balance between *fulfilling existing benefit commitments* and doing so "at *the lowest possible cost*."

3. The Wisconsin Court also emphasized the particular manner in which the $200 million credit provision of Act 11 operates, the limited impact of the provision, the fact that "absolute security" has never been a feature of the WRS, and the adoption in Act 11 of a "fail-safe" provision which ensures that "proper actuarial funding of the Wisconsin retirement system" shall be "maintain[ed]." *See supra* at 5-7. Each of those features of the Wisconsin statutes also serves to distinguish the situation here from the cases cited by petitioners that arose under statutes of other states.

Because the Wisconsin Court's determination that no property or contract rights were abridged in this case rests on a construction of state statutory provisions that are unique to Wisconsin, petitioners are far off the mark in suggesting that the decision below conflicts with decisions of other state courts. *See* Pet. 15-17. There is no such conflict, and review by this Court of the decision below would involve nothing more than second-guessing the Wisconsin Supreme Court's construction of the Wisconsin statutes.[2]

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[2] This reality is reflected in petitioners' lengthy argument as to why they believe the decision is contrary to "Wisconsin law," Pet. 19-22 (*see also* Pet. 16-17,18) and in petitioners' repeated elaborations of their construction of various subsections of Chapter 40 of the Wisconsin statutes, *see* Pet. 21-24, 27-29.

II. THE WISCONSIN STATUTE CHALLENGED IN THIS CASE DOES NOT INVOLVE ANY TAKING OF RETIREMENT FUND ASSETS, OR ANY OTHER ACTION OF A TYPE THAT HAS BEEN FOUND UNCONSTITUTIONAL BY ANY COURT

Even putting aside the dispositive consideration that the state statutes governing this case are fundamentally different from the statutes of the states whose courts, in petitioners' words, "have held that participants have a vested interest in the underlying assets of their pension system," Pet. 16, the decision below does not conflict with the decisions of those courts for an additional reason: the challenged $200 million credit does not take, or affect in any way, "the underlying assets of [the Wisconsin] pension system."

The $200 million credit does not remove any funds from the employer accumulation reserve account or from any other WRS trust account. App. 77. "All money in the employer reserve remains in the reserve and will go toward funding future benefits." App. 79. Thus, this case does *not* present the question whether participants' rights in a pension system extend to "the underlying assets," Pet. 16, or instead are "limited to satisfaction of their benefit commitments," Pet. 17—which is the conflict petitioners attempt to pose. Rather, all that the $200 million credit does is to dispense with *future employer contributions* for a limited period of time. App. 70-71.[3]

---

[3] Thus, petitioners' argument that they have a property interest "in all the assets and earnings of the WRS," Pet. 19, is beside the point. Treating $200 million of the employer reserve as a credit against future contributions is no different in purpose or effect from simply providing that otherwise-required future employer contributions will be reduced by $200 million. In administering the system, it is a useful construct to treat the $200 million as "paying" the employers' contributions, but this "credit" approach does not "take" trust assets and give them to employers, any more than would be the case with a simple moratorium on

No case cited by petitioners—and no case of which we are aware—has held that a law reducing contributions to a public employee retirement system violates federal constitutional rights where, as here, the legislation responds to a dramatic increase in the assets of the system, and the retirement fund continues to be actuarially sound.

In *Dadisman v. Moore*, 384 S.E.2d 816 (W. Va. 1988), and *Dombrowski v. City of Philadelphia*, 245 A.2d 238 (Pa. 1968), the claim was that the legislative change had made the fund "actuarially unsound." *Dadisman*, 384 S.E.2d at 822; *Dombrowski*, 245 A.2d at 246-247. Indeed, the *Dadisman* court stated that a legislative "alteration to the pension scheme" would *not* constitute an impairment of contract if it "serves to keep the system sound and flexible," 384 S.E.2d at 827—as is the case with Act 11.

In both *Valdes v. Cory*, 189 Cal. Rptr. 212 (Cal. App. 1983), and *Weaver v. Evans*, 495 P.2d 639 (Wash. 1972), the courts (an intermediate appellate court in *Valdes*, and a court applying *state* law in *Weaver* [4]) stated that the test for a permissible legislative modification of a retirement system is whether the modification "bear[s] some material relation to the theory of a pension system and its successful operation." *Valdes*, 189 Cal. Rptr. at 221; *Weaver*, 495 P.2d at 649. That

---

contributions. And this is true even accepting petitioners' characterization of the WRS's unfunded liability as a "debt" owed by contributing employers. *See* Pet. 29. Nothing in Act 11 forgives that "debt." The $200 million credit only affects the manner and timing of funding the unfunded liability, not the ultimate obligation to provide the necessary funding; and the Wisconsin statutes never have given WRS participants an unalterable right to any particular funding methodology. App. 76, 78, 79.

The tortured nature of petitioners' efforts to explain in the court below how the $200 million credit supposedly harms their interests, *see supra* at 6-7, provides further confirmation that the situation presented here is worlds away from any taking of property or impairment of contract.

[4] Federal law is not mentioned in the opinion in *Weaver*.

test plainly is satisfied in this case. In *Valdes* and *Weaver*, it was not satisfied because the legislatures had enacted a moratorium on pension contributions in order to solve a statewide fiscal crisis, *without any apparent regard for the sufficiency of the retirement fund's assets*. *Valdes*, 189 Cal. Rptr. at 226; *Weaver*, 495 P.2d at 640-641. Here, in contrast, the legislature took pains to preserve the actuarial soundness of the system: the $200 million credit against future contributions was enacted in response to a huge increase in trust fund assets, as a result of which the contributions represented by the credit simply are "not needed now, may not be needed in the future, and absolutely will have to be paid for if ever it is needed." App. 75. *See supra* at 4.[5]

In sum, the provision of Act 11 that is challenged by petitioners is a measured and sensible response to the huge unanticipated increase in the assets of the WRS that had developed in the period preceding enactment of the legislation. No court—much less any court construing provisions such as are found in the unique state statutes that govern this case—has held that a legislature is precluded by the federal Constitution from adopting a temporary "respite from employer contributions," App. 75, in such circumstances. This case presents no conflict of caselaw, and no issue that warrants review.

---

[5] Quixotically, petitioners assert that the Wisconsin Supreme Court's decision conflicts with prior *Wisconsin* cases. *See* Pet. 16-17. However, to mention only one of many distinctions, the earlier Wisconsin cases on which petitioners rely involved the *removal of assets* from a trust fund. *See Association of State Prosecutors v. Milwaukee County*, 544 N.W. 2d 888 (Wis. 1996); *State Teachers' Retirement Board v. Giessel*, 106 N.W. 2d 301 (Wis. 1960).

Petitioners also cite *McDermott v. Regan*, 624 N.E. 2d 985 (N.Y. 1993), but that case arose under state, not federal law; and, unlike the situation here, the legislative change in *McDermott* resulted in an "inappropriate level of risk" that accrued benefits might not be paid. *Id.* at 988.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Respondents.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Wisconsin Supreme Court correctly determined that participants in the Wisconsin Retirement System have no contract right or property interest in determining the timing and application of investment earnings to employer contributions when the employers' ultimate funding obligations are not altered, the investment earnings are used for Trust Fund purposes, and the change will not render the Wisconsin Retirement System actuarially unsound.

2. Whether the Wisconsin Supreme Court correctly determined that modifying the timing of employer contributions does not constitute either a taking or a violation of the contract rights of participants in the Wisconsin Retirement System.

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1999 Wisconsin Act 11 ..... *passim*
Wis. Stat. § 40.01 ..... 9, 11
Wis. Stat. § 40.01(2) 15, 17, 23, 25
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SUMMARY OF OPPOSITION

The State Respondents respectfully ask this Court to deny the petition for a writ of certiorari to review the decision of the Wisconsin Supreme Court for at least two reasons. First, the petitioners attempt to manufacture a conflict where none exists between various state court decisions. Second, the petitioners also attempt to manufacture a "radical departure from precedent" which misapprehends the decision in this case. The decision does not merit review by this Court.

STATEMENT OF THE CASE

Petitioners seek review of only one portion of the Wisconsin Supreme Court's decision declaring constitutional a number of legislative revisions to the Wisconsin Retirement System passed as part of the Pension Improvement Bill, 1999 A.B. 495, which became 1999 Wisconsin Act 11 ("Act 11"). The Wisconsin Supreme Court determined that sections 27(1)(a) and (1)(b)1 of Act 11, which designate a portion of monies in the employer reserve account for an "employer credit," are constitutional and do not violate petitioners' contractual rights or property interests in the Wisconsin Retirement System.

A. Procedural History of the Case

Act 11 improved benefits and made certain changes to the Wisconsin Retirement System ("WRS"). On December 23, 1999, the Employe Trust Funds Board (the "ETF Board"), the Department of Employe Trust Funds (the "DETF") and its Secretary, Eric Stanchfield (collectively,

the "ETF Petitioners") filed a Petition for Leave to Commence an Original Action, naming as respondents Secretary of the Wisconsin Department of Administration George Lightbourn and Wisconsin Treasurer Jack C. Voight ("State Respondents"). The Petition sought declarations regarding the constitutionality of various provisions of Act 11.

The Wisconsin Education Association Council and certain of its members (collectively, "WEAC") moved to intervene as respondents. The Wisconsin Professional Police Association and several of its members (collectively, "WPPA") and the State Engineering Association and several of its members (collectively, "SEA") separately moved to intervene as petitioners.

On February 10, 2000, the court issued an order denying ETF Petitioners' Petition and granting all motions to intervene. WPPA and SEA were designated as petitioners; the State Respondents and WEAC were designated as respondents. The WPPA Petition was designated as the complaint in the case, and the court permitted the SEA to supplement the WPPA complaint.

By order of May 25, 2000, the Wisconsin Supreme Court granted the WPPA and SEA Petitions for Leave to Commence an Original Action. The court adopted the parties' Stipulation of Facts and Stipulated Exhibits. Briefs were filed and the Wisconsin Supreme Court heard extended oral argument. On June 12, 2001, the Wisconsin Supreme Court issued its ruling declaring constitutional all challenged portions of Act 11.

B. Statement of Facts[1]

1. Creation of and Funding the Wisconsin Retirement System

The WRS is the product of many years of legislative action on public employee retirement in Wisconsin. App. 7 ¶ 7.[2] The WRS consists of about 461,000 participants: about 255,000 active employees (who are divided into several categories), 103,000 annuitants, and 103,000 "inactive participants" (former participating employees who have not yet become annuitants). App. 9 ¶¶ 11-13. The WRS is supported by nearly 1,200 different employers, including the agencies of the State of Wisconsin and various local governmental units. *Id.*

The WRS is funded by contributions from employers and employees, and the interest and other investment income earned on these contributions (the "Trust Fund"). App. 9 ¶ 13. Required employee contributions are set by statute as a percentage of an employee's income. Employees may also make voluntary contributions. App. 10-11 ¶¶ 14-15.

Employer contributions are determined differently. Employer contribution rates are not set by statute. Instead, they are determined annually as part of an actuarial evaluation of the WRS. Each year the WRS consulting actuary evaluates the funding requirements for the system to meet the costs of estimated future retirement benefits. The annual contribution rate developed for

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[1] As petitioners acknowledge, the Wisconsin Supreme Court made its determinations on stipulated facts, the most pertinent of which are included.

[2] References to petitioners' appendix are designed "App. ___."

employers is the amount sufficient to fund over time the projected benefit costs, net of all revenues received from employee contributions and investment earnings credited as current income. App. 11-12 ¶ 16. Nothing in Act 11 changed this obligation to ensure funding of promised WRS benefits. App. 74-75 ¶¶ 174-76.

Employers are required to pay contributions both for current service as well as for any unfunded prior service liability ("unfunded liability") owed to the WRS. App. 13-14 ¶¶ 19-20. An employer's unfunded liability is the result of two factors: (1) a grant of credit under the WRS for services rendered by an employee before the employer joined the WRS; and (2) an increase in benefits for an employee's prior service created by legislation enhancing benefits. When the legislature authorizes increased benefits for WRS participants and retroactively applies the benefit increase to prior service, employers may be forced to make additional contributions to the employer reserve to fund the retroactive benefits increase. Employer contribution rates for the payment of unfunded liability are currently amortized over 40 years. *Id.*

2. Employee, Employer and Annuity Reserves

The fixed retirement investment trust, which is the relevant portion of the Trust Fund for purposes of this case, contained at the relevant time about $48.7 billion. Within the fixed retirement investment trust, four accounts or reserves are most pertinent to this case: the employer accumulation reserve (holding about $11.5 billion), the employee accumulation reserve (holding about $10 billion), the annuity reserve (holding about $14.8

billion) and the transaction amortization account (holding about $11.5 billion). App. 17-25 ¶¶ 24-36.

The employee reserve holds the employee contributions. Within the employee reserve, each participant has his or her own individual account. The employer reserve holds the contributions required of the employers. The employer reserve is maintained without regard to the identity of any individual employer or participant. The annuity reserve holds the monies to be distributed to annuitants once they begin to draw either a money purchase or formula benefit. App. 104-107 ¶¶ 11-18.

When an employee leaves public service and begins to draw a benefit, the entire balance of that employee's account in the employee reserve is transferred to the annuity reserve. In addition, an amount is credited to the annuity reserve from the employer reserve "that when increased by an interest assumption of 5% annually will fully finance the [employee's] future benefit payments." App. 21-22 ¶ 32. The dollars transferred from the employer reserve are not earmarked for any specific participant until they are deposited into the annuity reserve.

3. Annuity Benefits

Upon retirement, an annuitant will always receive the higher of the money purchase or the formula benefit amount. Under the formula benefit, eligible WRS participants may receive a specific retirement benefit calculated pursuant to a formula. Under the money purchase benefit, WRS participants are guaranteed that the minimum annuity benefit they will receive will equal the sum of the participant's accumulated contributions (including interest) plus an amount from the employer reserve equal to the participant's accumulated required contributions.

App. 103-104 ¶¶ 7-11. The amount of money in the employer reserve does not affect the amount of the annuity which an annuitant is entitled to receive. App. 74 ¶ 172.

4. The Transaction Amortization Account

The transaction amortization account, or "TAA," is more of an accounting mechanism than a separate account. All realized and unrealized gains and losses of the fixed retirement investment trust are credited to the TAA. Prior to enactment of Act 11 (which eliminated the TAA and replaced it with a different but similar mechanism), 20% of the TAA balance was distributed annually to the Trust Fund, with the distributions divided proportionately among the accounts and reserves. This distribution generally approximates 20% of the gain or loss on each reserve or account (employer, employee and annuity) over and above the expected rate of return for the year from investing the dollars in those accounts and reserves. The purpose of the TAA is to smooth the impact of investment gains and losses on the accounts and reserves of the Trust Fund. This tends to create greater predictability for determining the contributions necessary to fund benefits and to stabilize dividend distributions to annuitants. App. 22-23 ¶¶ 33-34.

5. The Challenged Provisions of Act 11

The portion of Act 11 at issue in the petition accelerates distribution of monies from the TAA into the employer, employee and annuity reserves. In addition to the usual annual 20% distribution, Act 11 accelerated distribution of another $4 billion from the TAA into the three reserves. The $4 billion accelerated recognition was

credited proportionately to the employer ($1.236 billion), employee ($1.064 billion) and annuity ($1.608 billion) reserves. App. 70 ¶ 162. This accelerated recognition was made to fund a portion of the cost of paying for certain WRS benefit enhancements which were also part of Act 11. App. 122 ¶ 56. Even if this accelerated recognition had not been made, the $4 billion would have been recognized into the employer, employee and reserve accounts in the five years after the effective date of Act 11. App. 111 ¶ 25.

Act 11 provided that $200 million of the $1.236 billion increase in the employer reserve resulting from the $4 billion TAA distribution be used to establish employer credits. App. 29. These credits permit suspension of payments for unfunded liability. Employers who have already paid off their unfunded liability or who have credits in excess of such unfunded liability can suspend their payment of the employer required contributions for current liabilities until their credits are exhausted. After an employer's credits have been exhausted, the employer is required to resume payments to satisfy required contributions and any remaining unfunded liability. App. 29-30. The application of this credit does not negate the employers' obligation to provide sufficient funding to meet WRS benefit commitments. App. 74, 75.

6. After Act 11 is Implemented, the Trust Fund Remains Actuarially Sound

Of critical importance is the fact admitted by all parties, including petitioners, that the Trust Fund is not financially troubled, and implementation of Act 11 by itself will not make it so. App. 121 ¶ 54. The Wisconsin Supreme Court further found that the Trust Fund, as

changed by Act 11, will be actuarially sound. App. 135. The petitioners specifically stated that the provisions of Act 11, including this employer credit, "do not leave the Trust Fund in a financially troubled condition, now or in the future." App. 135.

C. The Wisconsin Supreme Court Decision

The Wisconsin Supreme Court's decision describes the rights of participants in the WRS. It is well-established that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Drawing on the language of the statutes – which create the "trust document" – as well as on prior case law, the Wisconsin Supreme Court explained the general framework within which WRS participants' contract rights and property interests are defined. App. 49-57.

1. Benefit Commitments, Subject to Legislative Reservation

Every participant has interests and rights in the WRS. App. 49. Every participant is either an annuitant (one already receiving benefits under the WRS), or a potential annuitant (with an individual account in the employee reserve). *Id.* Each participant has a property interest in his or her annuity or individual account, and a right to protect that interest.

In addition to this narrow individual interest, each participant has a broad property interest in the WRS as a

whole. *Id.* However, because there are multiple categories and subcategories of participants, different participants have different interests. Nonannuitants have different interests than annuitants. The Wisconsin Supreme Court very carefully explained why it differentiated between these various groups and their rights in the WRS in its previous decisions. The Court did not ignore or overrule its prior holdings. App. 50-51. This case presented facts and issues not considered in past decisions.

The property interests and contract rights of participants in the WRS derive from the statutes. Under Wis. Stat. §§ 40.01 and 40.19, the legislature defined the purpose of the Trust Fund, as well as the protected property interests and contract rights of participants therein. In general, when the legislature passes legislation, it retains the right to modify or rescind that legislation and cannot bind future legislatures to its actions. The presumption is that a law "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Educ.*, 302 U.S. 74, 78 (1937) (cited with approval in *Morrison v. Board of Educ.*, 237 Wis. 483, 487, 297 N.W. 383 (1941)). The legislature limited that unfettered legislative prerogative when it created Wis. Stat. ch. 40, the blueprint for the current Wisconsin Retirement System.

Section 40.19(1) of the Wisconsin Statutes establishes certain contract rights as follows:

> *Rights exercised* and *benefits accrued* to an employee under this chapter *for service rendered* shall *be due* as a contractual right and shall not be abrogated by any subsequent legislative act. *The right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state*

> and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

Section 40.19(1) requires a balancing of interests. On the one hand, a participant has certain contractual rights that may not be abrogated by subsequent legislative acts. On the other hand, the legislature retains the right to amend or repeal any part of the trust document (Wis. Stat. ch. 40), and there is no right to further accrual of benefits nor future exercise of rights for service rendered after the effective date of amendment thereof. App. 52-53. Moreover, the state is not prevented from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value. *Id.*[3] The reservations retained by the legislature in § 40.19(1) are, as the Wisconsin Supreme Court held, "just as much a part of the contract as any other provision in Chapter 40." App. 80 ¶ 196.

All of this begs the question, of course, of what "rights and benefits" are granted and protected. The Wisconsin Supreme Court concludes that § 40.19(1) provides a limited contractual right that does not extend to every provision of ch. 40 or every procedural or substantive

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[3] The court has found that "[n]o participant's accrued benefits are abrogated, damaged or threatened. Most participants will receive substantial benefit improvements." App. 64 ¶ 142.

aspect of the WRS – but only to "rights exercised and benefits accrued which are due for service rendered." App. 53 ¶ 111. This would include a right to an accrued monetary benefit; however, it would not include a right "to maintain some operating procedure in the WRS that had existed during a period that the participant was rendering service." *Id.*

2. Proper Use of Trust Fund.

In general, "[t]he purpose of pension plans is to give the employees a protected interest in postretirement income." *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 563, 544 N.W.2d 888 (1996). In addition to the specific right to rights exercised and benefits accrued, WRS participants also have property interests arising from Wis. Stat. § 40.01, which defines the purpose of the Trust Fund. The Trust Fund is created, in part, "to aid public employees in protecting themselves and their beneficiaries against the financial hardships of old age and death." The trust fund "is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of insuring the fulfillment at the lowest possible cost of the benefit commitments to participants . . . and shall not be used for any other purpose." App. 54-55.

Like § 40.19(1), this provision reveals a certain internal tension, because it requires that benefits be fulfilled, but "at the lowest possible cost." As the Wisconsin Supreme Court points out, this is different from a mandate to maximize benefits irrespective of cost. App. 55 ¶ 115.

Section 40.01 also sets forth specific safeguards to participants. First, trust fund money must be used for

proper trust fund purposes. App. 55 ¶ 116. Second, legislative actions affecting the WRS must be consistent with the stated objectives of the trust. App. 56 ¶ 119. Third, the ETF Board must deal with the WRS in the same faithful manner as trustees would administer any trust; they must exercise diligence, prudence and absolute fidelity in managing trust assets. Act 11 reaffirms the position of the Board to that effect. 1991 Wis. Act 11, § 27(3). App. 139 ("Notwithstanding any provision in this act, the employe trust funds board shall retain the authority to maintain proper actuarial funding of the Wisconsin retirement system").

3. Integrity and Security of Trust Fund.

Finally, the Wisconsin Supreme Court cites as a third source of property interests and rights the integrity and security of the retirement funds. The statutes confer upon the participants the right to protect their individual accounts from either abrogation or dissipation. App. 57 ¶ 121; *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 544 N.W.2d 888 (1996).

Applying these principles to the claims made by petitioners, including claims relating to the creation of the employer credit, the Wisconsin Supreme Court properly concludes that Act 11 is consistent with the contract rights and property interests of the WRS participants.

REASONS FOR DENYING THE WRIT

I. THE WISCONSIN DECISION DOES NOT CREATE CONFLICTS WITH DECISIONS OF OTHER STATE COURTS

Many state courts have considered challenges to legislative changes or other actions affecting their public

employee pensions systems. In some cases those changes have been upheld and in others they have not. Although generalizations can be made about how various states analyze and review their pension systems, the decisions are not uniform in defining the rights, benefits and interests of various classes of participants in those systems. The reason for that is not sinister, is not the result of "judicial tampering with established property interests,"[4] and does not cry out for "correction" from this Court.

In an egregious misrepresentation of the Wisconsin Supreme Court's decision in this case, petitioners claim that the court "held that the vested property and contract rights of WRS Participants is limited to their benefit commitments, and does not extend to the assets and earnings contained in the WRS Trust Fund." Petition at 15. This description of the decision is simply wrong.

As explained above, the Wisconsin Supreme Court determined that WRS participants have a right to (a) rights exercised and benefits accrued for service rendered; (b) proper use of the Trust Funds; and (c) the security and integrity of those funds. App. 49-57. However, in this case, the fact that (i) obligations of employers to fund benefits remain unchanged, (ii) employer reserve monies are used to pay Trust Fund obligations, and (iii) implementation of Act 11 does not cause the WRS to become actuarially unsound led the court to conclude that no contract rights or property interests of petitioners were threatened by the challenged provisions of Act 11.

Petitioners attempt to generalize the so-called "conflicting" state court decisions as either protecting solely the right to receive benefits or protecting the right to

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[4] Petition at 17.

receive benefits and having a "property interest in the underlying assets of their pension system." Petition at 16.[5] This is a vast over-simplification and, at the same time, says almost nothing. To say there is a "property interest in the underlying assets of [a] pension system" does nothing to define just what those interests are. The interest to have money deposited into the system? How much? When? Who decides? Or is it the interest in how the money is used? By whom? When? For what purposes? Contrary to petitioners' implied suggestion that these questions are answered the same way by those state courts in "one camp," and a different way by all those state courts in the "other camp," this is simply not how the cases work. Public pension systems are often complicated. They are certainly not the same from one state to the next. For each case in which changes to a system are not allowed, one can find other cases where changes to the system *have* been allowed.

The decision below is not in conflict with, but rather distinguishable from the decision in *McDermott v. Regan*, 82 N.Y.2d 354, 624 N.E.2d 985 (1993). In New York, rights in the public employee retirement system are established by the New York constitution. In Wisconsin, they are established by statute. In New York, the change from one funding system to another divested control from the state comptroller as trustee of the fund; in this case, the statute specifically preserves the trustees' obligation to ensure proper actuarial funding of the WRS. 82 N.Y.2d at 360-61; App. 79. In New York, the only factor considered by the

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[5] Interestingly, petitioners cited not a single one of these cases in the several briefs they filed with the Wisconsin Supreme Court in support of their positions in this case.

legislature when it chose to alter the funding method was the fiscal crisis facing the state. 82 N.Y.2d at 362. In Wisconsin, there is no evidence that the modification was anything other than one of the various aspects of funding the increased benefits provided for in Act 11. In New York, there is no requirement to consider the "price" of fulfilling benefit commitments. In Wisconsin, ch. 40 requires administration of the Trust Fund to fulfill benefit commitments "at the lowest possible cost." Wis. Stat. § 40.01(2); App. 78; 142. In New York, the record included an actuarial study concluding that the new funding method created an inappropriate level of risk. 82 N.E.2d at 361. In Wisconsin, the record included a stipulation that the challenged legislation would not render the Trust Fund actuarially unsound. App. 81.

The facts of *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988), bear no similarity to those at issue in this case. West Virginia statutes provided that the public employee system trustees certify an actuarially-determined funding amount to the Governor, who is required to include that amount in his appropriation bill to the West Virginia legislature. He refused to perform this ministerial duty, and the appropriations were not made. The West Virginia court found this refusal unconstitutional.[6]

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[6] The Court ordered an actuarial determination and repayment of any underfunding of the system produced by these missed appropriations. In *State ex rel. Dadisman v. Caperton*, 186 W. Va. 627, 413 S.E.2d 684 (1991), the court determined that no "replacement" appropriations were necessary because the actuary did not determine that the system was rendered actuarially unsound by the underfunding which was the subject of *Dadisman v. Moore*. Furthermore, the *Caperton* court found that a legislative change to the accounting in the

Nothing like that occurred in this case. The West Virginia court noted that the legislature impairs contract obligations when it "attempts to change important provisions of an existing contract outside the limits of the reserved state powers." 181 W. Va. at 790. In this case, however, there are specific powers reserved to the state of Wisconsin to make changes to the WRS, and the changes at issue are not outside those reserved powers. Furthermore, subsequent cases in West Virginia made it clear that the court's ruling in *Dadisman v. Moore* did not preclude every legislative change to the public employee pension system in that state, including changes in accounting procedures. *State ex rel. Dadisman v. Caperton*, 186 W. Va. 627, 413 S.E.2d 684 (1991).

In *Valdes v. Cory*, 139 Cal. App. 3d 773, 189 Cal. Rptr. 212 (1983), the legislation at issue, which suspended payments from the state to the public employee retirement system, was admittedly passed solely to meet the constitutional mandate to balance the state budget. The retirement law required statutorily set payments to be made until the retirement board or the legislature, after due consideration of the actuarial recommendations by the Board. No such input was obtained by the California legislature. 139 Cal. App. 3d at 787. In Wisconsin, there is no such requirement. However, even if there was, there were actuarial reports prepared in connection with the benefit enhancement legislation which became Act 11. Stipulated Exhs. 12, 13. Furthermore, in the WRS, the

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system which eliminated underfunding for one set of employees by applying the overfunding of another set of employees in the system did not violate any contract rights or property interests of system participants.

monies set aside for the employer credit were always destined to be deposited into the employer reserve, and in fact would have all been deposited there within five years, when the TAA is set to terminate. And those deposits would, in turn, have always reduced the amount of payments made by the employers into the employer reserve account. The only change was to the timing of that reduction – immediately, or over a number of years as a change in the employer contribution rate. App. 111 ¶ 55; App. 77-78 ¶¶ 184-86.

In *Weaver v. Evans*, 80 Wash. 2d 461, 495 P.2d 639 (1972), the sharply divided court found that reducing state appropriations to the retirement system due to a state budget shortfall was an impermissible violation of contract. Act 11 was a pension improvement bill which had no relationship to any budget shortfall.[7] It used as part of the funding of WRS obligations a method which had always been used – recognition of investment earnings on the employer reserve to that reserve – but simply changed the effect of a portion of that recognition from one which would change the employers' contribution rate to a more immediate credit.

In *Dombrowski v. City of Philadelphia*, 431 Pa. 199, 245 A.2d 238 (1968), the record indicated that appropriations

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[7] Petitioners assert that "there is no legitimate public purpose being served by Act 11" other than budget relief. App. 29. This is incorrect and contradicted by the record in the case. Act 11 was benefit enhancement legislation, which included funding for those benefit enhancements. App. 68 ¶ 153. The record is absolutely devoid of any evidence that Act 11 was passed due to budget shortfalls or for any other reason inconsistent with the mandate of § 40.01(2) to utilize the Trust Fund to fulfill benefit commitments at the lowest possible cost.

made by the city were insufficient to maintain the city's retirement system in an actuarially sound condition. By contrast, the record is clear that Act 11 does not render the WRS actuarially unsound.

The *Dombrowski* decision itself explains why it does not "conflict" with the decision below in this case by describing why its decision differs from the one it rendered in *Geary v. Allegheny County Retirement Board*, 426 Pa. 254, 231 A.2d 743 (1967). In *Geary*, the court found constitutional an act which reduced retirement age, thereby allegedly decreasing the actuarial soundness of the retirement fund. In *Geary*, the court determined that a decrease in actuarial soundness by itself is not sufficient to constitute a deprivation of vested rights or an impairment of contract rights, finding that "a legislative alteration of retirement laws whose only adverse effect on participants is to increase a theoretical possibility that payments to them will not be met is not a sufficiently concrete detriment to constitute a violation of constitutional guarantees." 426 Pa. at 259.

The *Dombrowski* court found *Geary* clearly distinguishable because in *Dombrowski* there was no legislative alteration of the pension plan, there was nothing theoretical about the actuarial unsoundness of the plan, and the issue was not unconstitutional impairment but rather simply an argument that the City was not fulfilling its contractual obligations. Those same three distinctions can be drawn between *Dombrowski* and the present case.

Even in the cases cited by petitioners, the courts acknowledge that changes to the pension systems in those states can be made without a taking and without constituting an unconstitutional impairment of contract. In *Weaver*, the court acknowledged that:

> [a]n employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

80 Wash. 2d at 476 (citations and quotations omitted; citing decisions from California, Georgia, Pennsylvania and Washington). *See also, State ex rel. Dadisman v. Caperton*, 186 W. Va. 627, 413 S.E.2d 684 (1991). Similar conditions on pension changes are acknowledged in the decision below, indicating that there is no "great divide" among the various state decisions. Instead, there is consideration of various changes which, predictably, lead to various results.

Contrary to petitioners' argument, the decision below does not limit protected rights and interests in the WRS to benefit payments; it also ensures proper use of Trust Funds, and maintenance of the security and integrity of the funds. Petitioners' attempt to set up a false conflict among state court decisions is no basis for granting the petition.

II. THE WISCONSIN SUPREME COURT'S DECISION IS CORRECT.

Public pension legislation "enjoys the same strong presumption of constitutionality as any other legislative enactment." *Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd.*, 207 Wis. 2d 1, 17-18, 558 N.W.2d 83 (1997). Petitioners were unable to overcome this presumption or meet their burden of proving Act 11 constitutional beyond a reasonable doubt.

A. The Wisconsin Supreme Court Properly Defined the Contract Rights and Property Interests of Participants in the WRS.

The Wisconsin Supreme Court ruled that WRS participants have a right to (a) rights exercised and benefits accrued for services rendered; (b) proper use of the Trust Funds; and (c) the security and integrity of those funds. App. 49-57.

This bundle of contract rights and property interests in the WRS does not – and should not – render the WRS unresponsive to the needs of its beneficiaries, changing economic conditions, actuarial principles, funding or investment strategies. Petitioners fail to distinguish among the aspects of the WRS which are properly protected contract and property rights, and the aspects of the WRS which are subject to change and modification without impingement of those protected rights.[8]

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[8] Even the "rights exercised" and "benefits accrued" that are specifically "due" for "services rendered" under § 40.19 can be forfeited as a condition for receiving subsequently enacted rights and benefits of equal or greater value. § 40.19(1). In addition, the participants' interest in the integrity and security of retirement funds "does not render every legislative

One might think from reading the petition that there are many cases describing participants' rights in the WRS which have been ignored by the Wisconsin Supreme Court. In fact, there are relatively few cases specifically about the WRS, and each one was considered by the court and used as a basis upon which to build the decision in this case. App 49-51; 55-57. Indeed, the court relied upon cases addressing predecessor systems as well as other public pension systems besides the WRS. The court distinguished the facts and WRS changes at issue in prior cases from the system enhancements of Act 11. App. 69. However, contrary to the argument made by petitioners, the court has not overruled its previous holdings or ignored them.

B. The $200 Million Employer Credit Account Does Not Violate the WRS Contract, and Thus Does Not Constitute Either a Taking or an Unconstitutional Contractual Impairment.

1. The $200 Million Employer Credit Does Not Violate the WRS Contract.

The Wisconsin Supreme Court determined that the creation of the $200 million employer credit did not constitute any impairment of the WRS contract. App. 80 ¶ 193. Nor did creation of the credit constitute a taking. App. 79 ¶¶ 189-192. The court found that the sole purpose of the employer reserve is to ensure the fulfillment of benefit commitments to participants at the lowest possible cost. App. 72 ¶ 165. To achieve this objective, employers are required to make contributions for current

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intervention into a retirement trust fund unconstitutional." *Association of State Prosecutors*, 199 Wis. 2d at 563.

service, and contributions to erase unfunded liability. App. 72 ¶ 166. The employer reserve contains both employer contributions and earnings on those contributions. The balance in the employer reserve does not determine the benefits received by an annuitant. App. 74 ¶ 172.

The court observed that even if employers paid every penny of unfunded liability, they would still be responsible for future unfunded liability resulting from (1) benefit increases voted by the legislature, (2) new recognitions of past service, and (3) actuarially-based recalculation of liability by the ETF Board. App. 74-75 ¶ 174. However, while the amount of the liability might change, the obligation of employers to fulfill benefit commitments to participants is unchanged by Act 11. App. 75 ¶ 175.

SEA posits that the Trust Fund is more secure with cash reserves than when a portion of those reserves is replaced with a promise of future payment. While the court acknowledges that may be true, the court further points out that chapter 40 explicitly recognizes unfunded liability, allows it to be paid over a 40-year period, and permits adjustment of the amount of such liability by future legislative, economic and actuarial events. App. 76 ¶ 178. While chapter 40 creates absolute liability for accrued benefits, it does not create absolute security for that liability. That would require cash in advance, which the statutes specifically do not demand. *Id.*

The Wisconsin Supreme Court recognized that non-annuitant participants in the WRS have a general property interest in the employer reserve because it is one of the funding sources for future benefits. Non-annuitant participants have the right to protect the integrity and

security of the employer reserve so that benefit commitments will be fulfilled. They also have the right to limit use of the monies to Trust Fund purposes. App. 79 ¶ 190.

However, these non-annuitant participants do not have a right to require more than is necessary to fulfill benefit commitments over an actuarially-determined period of time. The Trust Fund Board's mandate to maintain proper actuarial funding of the WRS was not eliminated in Act 11, it was reinforced. 1999 Wis. Act 11 § 27(3); App. 79 ¶ 191. Further, the record established by stipulation is that implementation of Act 11 will not leave the Trust Fund actuarially unsound. App. 121 ¶ 54; App. 135.

2. The $200 Million Credit Is a Proper Trust Fund Purpose

The establishment of the employer credit account is a proper Trust Fund purpose. Section 40.01(2) requires that the Trust Fund, which includes the employer accumulation reserve, be "managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the [ch. 40] benefit commitments to participants." The establishment and use of the employer credit account within the employer accumulation reserve is a vehicle by which the reserve is managed, administered and dealt with to ensure fulfillment of benefit commitments "at the lowest possible cost." App. 78 ¶ 186.

This is not a situation where funds were directed into the employer reserve that would not have always gone there. In fact, with the elimination of the TAA, all monies in the TAA are distributed to the employer, employee and annuity reserves over 5 years. Thus, the question is not

whether the employer credit monies would have been recognized into the employer reserve, but only when such recognition would occur.[9]

In addition to the change in timing, the employer is permitted to take an immediate credit rather than simply take advantage of the likely reduction in contribution rates that this recognition would have eventually created. If the $200 million were not applied as a credit toward payments due from participating employers for unfunded liability or current contributions, it would be part of the total balance of the employer reserve considered by the actuary as one of several factors to determine contribution rates. App. 123 ¶ 59. Although standing alone and in the absence of other influences it would not have an immediate change in contribution rates, its impact upon employer contributions would simply be deferred and affect the next evaluation of contribution rates. App. 123 ¶ 60. However, the manner in which the recognition of $200 million of investment earnings in the employer accumulation reserve of the Trust Fund

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[9] Contrary to petitioners' implications, this is not the first time that the legislature has established an employer credit within the employer accumulation reserve. In 1989, pursuant to 1989 Wis. Act 13, § 47(2), the Legislature authorized – if recommended by the ETF consulting actuary – the use of the employer accumulation reserve's portion of the special $500 million transfer, after the liabilities created by 1989 Wis. Act 13 (primarily for early retirement) had been funded, for credits to individual employer's unfunded prior service liability accounts. However, all of the portion of the $500 million transfer credited to the employer accumulation reserve was necessary to fund liabilities created by 1989 Wis. Act 13, and no amounts were therefore allocated as credits toward any employer's unfunded liability under that provision of Act 13. App. 116 ¶ 35.

influences employer contributions to the WRS is *not* a protected contractual or property right of the petitioners. Every dollar of earnings that is recognized into the employer accumulation reserve eventually impacts the contribution rate, and therefor the amount of future employer contributions. App. 77 ¶ 184. Employer contribution rates have been reduced before as a result of favorable investment results for both current and unfunded liability. App. 32 ¶ 51.

Also contrary to petitioners' assertions, the employer credit account monies will be used solely to fulfill benefit commitments to WRS participants, as required by § 40.01(2). The monies are not removed from the WRS and paid over to someone other than WRS participants, as was the case in *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 544 N.W.2d 888 (1996). The monies stay in the Trust Fund and are used to pay annuities to eligible participants. App. 79 ¶ 192. That is how the employer accumulation monies have always been used. Act 11 does not change that use of the monies.

Furthermore, the parties agree that the Trust Fund is actuarially sound; that it is not financially troubled, and implementation of Act 11 by itself will not make it so. Thus, the security of the fund is not threatened by the proposed application of the $200 million credit account. App. 70 ¶ 160; App. 81 ¶ 197; App. 121 ¶ 54; App. 135.

3. The Amount of An Employer's Unfunded Liability and the Method of Payment Therefor is Not a Protected "Contract Right" or "Property Interest."

As the Wisconsin Supreme Court observes, Act 11 does not abrogate the statutory and constitutional obligation of employers to fulfill benefit commitments to participants. App. 75 ¶ 175. Petitioners claim a property interest in the employer reserve, and a contract right in a particular regimen of funding, even though the challenged changes will not threaten the actuarial soundness of the Trust Fund. App. 75 ¶ 176.

But petitioners are not entitled to absolute security. They are, instead, entitled to absolute liability. App. 76 ¶ 178. This is so in part because the dollar amount of liability will change based upon actuarial factors and participant choices. Factors affecting the dollar amount of liability include investment results, benefit changes, number of employees, salary levels, and the benefits each participant chooses.

The unfunded liabilities of employers under the WRS are not absolute, unchanging amounts.[10] The unfunded

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[10] In *Columbia County v. Board of Trustees of Wis. Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962), the court held that the payment of employer contributions based upon past service credits is a contingent liability, the amount which at any given time is not absolute. *Id.* at 328.

The *Columbia County* court explained:

> The amount of the obligation to finance the pension involves so many variable factors that the obligation of a county must be redetermined each year on an actuarial basis in the light of changing contingencies. . . .

liabilities of employers have been recalculated several times. These recalculations follow adjustments to the actuarial assumptions that govern overall funding requirements for the WRS. In 1989, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.5% to 7.8%, the DETF recalculated the remaining unfunded liabilities using the new assumed rate. As a result, the aggregate unfunded liabilities of all employers as carried on DETF's books, was reduced by $90,589,521. In 1991, when the actuary recommended (and the ETF Board approved) changing the assumed rate from 7.8% to 8.0%, the DETF recalculated the remaining unfunded liabilities using the new assumed rate. As a result, the aggregate unfunded liabilities of all employers as carried on DETF's books, was reduced by $59,477,500. In 1994, when the actuary recommended (and the Board approved) changing the across-

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> The obligation for past service credits is not ascertainable for any period of time except for the convenience of making payments during a given year. The best that can be said is that the obligation is to pay some amount which varies. Such an obligation is distinctly different in nature from a bond issue or a contracted obligation whereby the obligor has received the consideration, the principal amount is certain, and is to be paid over a definite period of years, in stated amounts. . . .
>
> The prior-service-credit obligation is uncertain and indefinite in amount and necessarily will continue to be so. The nature of such an obligation is not a debt within the meaning of sec. 3, art. XI, Wis. Const.
>
> In this case, the county's obligation is conditioned upon future contingencies which under the pension plan will affect the amount of the annual payments.

Id. at 329-330.

the-board salary increase assumption from 5.6% to 5.3%, the DETF recalculated the remaining unfunded prior service liabilities of employers, using the new salary inflation assumption. As a result, the aggregate unfunded liabilities of all employers as carried on DETF's books was reduced by $85,117,420. App. 115 ¶ 33.[11]

Act 11, § 15, creates Wis. Stat. § 40.05(2)(cm), which clarifies that the DETF may adjust the unfunded liability of each employer to reflect changes in the assumed rate and the assumption for across-the-board salary increases, and any other factor specified by the actuary if the actuary recommends and the ETF Board approves the changes or if otherwise provided by law. Stipulated Exh. 1, p. 3 at § 15.[12]

Not only is the amount of employers' unfunded liabilities subject to adjustment (just as contributions for current service are influenced by actuarial assumptions which respond to changes in the WRS experience); there is evidence in the record supporting an argument that the unfunded liability does not really exist at all. According to the Joint Survey Committee Report on 1999 A.B. 495 (which was ultimately enacted as Act 11), the unfunded

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[11] In 1999, the ETF Board took the position that it had no statutory authority to adjust the employer's unfunded liability balance even when the WRS actuary subsequently recommends changes in the actuarial assumptions that were used when the initial unfunded liability balance was determined. App. 115 ¶ 34; App. 235-247.

[12] In fact, since the Stipulated Facts were submitted, the Trust Funds Board has announced on June 30, 2001 that based upon investment results, contribution rates will again decrease for 2001.

liability measured now at approximately $2.2 billion is really a "fictitious debt." According to the Report:

> The $2.2 billion in current "Unfunded Accrued Liability" charged against Wisconsin's public employers exists only because state statutes require the use of an archaic definition of Unfunded Accrued Liability known as the "Frozen Initial Liability Cost Method." Very few, if any, other states still use this method. Most use some version of the "Entry Age Cost Method", under which Wisconsin's public employers would actually have a fully funded retirement system – meaning no "Unfunded Liability" at all. It may seem like accounting sleight-of-hand, but the truth is that the only reason this $2.2 billion debt exists for the employers is that this archaic cost method is *still written into statute*. . . . This debt is only a debt because the law says it is. There is no logical reason whatever to believe in it.

(Emphasis in original). SEA Wisconsin App. at 91, 97. According to the Report, the WRS employers' liability is overstated by $2.4 billion. SEA Wisconsin App. at 97. This confirms that while there is a protected interest in adequate funding to pay contractually-promised benefits, it is appropriate to maintain flexibility on calculating and funding benefit obligations.

CONCLUSION

The constitutional protection of property interests and contract rights still start with the same analysis: how are the property interests and contract rights defined under state law? The contract rights and property interests of petitioners have been clearly defined by the

Wisconsin Supreme Court. Contrary to petitioners' representations regarding the decision of the Wisconsin Supreme Court in this case, that Court did not limit the interests of participants in the Trust Fund to benefit commitments. The Court reaffirmed the interest of the participants in the Trust Fund itself; to proper use of Trust Fund monies, and to the integrity and security of the Trust Fund. The factual record in this case does not support petitioners' allegations of impairment.

The fact that the Wisconsin Supreme Court differentiated the facts of this case (facts *admitted* by petitioners) from other cases heard by it in the past does not represent some "radical departure" from its previous holdings. For the reasons stated herein, the petition should be denied.

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No. 01-638

In The

Supreme Court of the United States

STATE ENGINEERING ASSOCIATION, *et al.*

Petitioners,

vs.

GEORGE LIGHTBOURN, Acting Secretary of the Wisconsin Department of Administration, *et al.*

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the assets and earnings of the Wisconsin Retirement System are the "private property" of participants in the Wisconsin Retirement System for purposes of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

2) Whether the judicial abandonment or recasting of well established private property rights, properly voids the Constitutional protections of the Fifth and Fourteenth Amendments to the United States Constitution as to the taking of such private property without just compensation and without due process of law.

3) Whether the challenged provisions of 1999 Wisconsin Act 11 take the private property of participants in the Wisconsin Retirement System without just compensation and without due process of law.

4) Whether the challenged provisions of 1999 Wisconsin Act 11 impair the contract between participants and the State of Wisconsin in violation of Article I, § 10 of the United States Constitution.

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I. NONE OF THE REASONS CITED BY RESPONDENTS SUPPORT DENIAL OF THE PETITION.

Several of the points made in Respondents' Briefs in Opposition warrant a reply:

1. The Respondents repeat the hollow assertion of the Wisconsin Supreme Court that Act 11 bolsters the security of the WRS by the inclusion of the following *non-statutory* language: " . . . the employee trust fund board [the trustees of the WRS trust fund] shall retain authority to maintain proper actuarial funding of the Wisconsin retirement system." The Court states: "[t]his affirmation of the ETF Board's authority represents a fail-safe for the WRS that overrides all other provisions of Act 11." App. 79, ¶ 191. It is astounding that this alleged "fail-safe" and "overriding" "affirmation" is contained in the *non-statutory* portion of Act 11; that it is part of legislation that seeks to use internal trust funds to pay for obligations that the trust fund's actuary has determined to be necessary for the funding of benefit commitments; and that it was inserted into Act 11 in anticipation of the present litigation.[1] Even as the court enunciates this empty "affirmation", it approves the use of trust funds as a source of funding a $200 Million dollar taxpayer "respite" by paying participating employer obligations to the WRS, that were actuarially determined, with WRS funds.

The absurdity of the court's view of Act 11 as protective of the "proper actuarial funding of the Wisconsin

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[1] Indeed, Act 11 contains a non-statutory provision expressly requesting that the Supreme Court take original jurisdiction of any litigation relating to the implementation of Act 11. App. 140.

retirement system" cannot be gainsaid when one considers what Act 11 does and the what the court does. The court declares that any concerns about future raids on the trust fund should be allayed because "the ETF Board would stand as a bulwark of fiduciary responsibility to protect the security of the fund." App. 81, ¶ 198. Yet, upon the adoption of Act 11 by the Wisconsin legislature, the ETF Board promptly filed a Petition for Leave to Commence an Original Action challenging the constitutionality of the $200 Million credit imposed by Act 11. The Wisconsin Supreme Court held that the ETF Board lacks standing to challenge the constitutionality of legislation duly enacted by the State of Wisconsin, dismissed the ETF Board's Petition, and later went so far as to deny the ETF Board's motion for leave to file an *amicus curiae* brief. App. 94-95 n. 1. Some "bulwark."

Without a standing army and without access to the courts, the trustee stands as the puppet of a legislature that can think of so many better uses for trust funds than the purpose for which the funds were entrusted. The Court is conspicuously silent as to how the "bulwark" could lawfully protect WRS assets. And what authority to "maintain proper actuarial funding" is preserved for the ETF Board by the *non-statutory* provisions of Act 11? The answer is none. While Petitioners recognize that a "mere" $200 Million have been taken, certainly much more has been put in harm's way with the "principle" that the government can take what does not belong to it as long as it does not take too much (enough to destroy "actuarial soundness").

Employer contribution rates are determined based on the amount which the WRS actuaries determine is needed to fund future benefits after considering all revenue

received from employee contributions and investment earnings. App. 112, ¶ 28. In accordance with this process, the WRS actuaries and the ETF Board determined the appropriate employer contribution rates. While the Respondents assert that this process is protected, even enhanced by Act 11, the fact is that Act 11 supplants those actuarially determined required contributions with existing trust funds. It is worse than nonsense to contend that required contributions to the trust, as determined by the actuaries, can properly be paid with credits that are funded by the trust that is supposed to receive the required payments. The actuaries did not set the required contribution levels at zero at any time. The employer contributions determined to be required by the ETF Board upon the advice of its actuaries will consume the State's $56.3 Million share of the credit in 22.1 months, and School Districts' $84 Million share of the credit in 19.6 months. App. 274. Yet Act 11, implemented by order of the Wisconsin Supreme Court, results in employers not having to pay their required contributions. Act 11 effectively overrides the actuarially set required contribution rates and thereby denies the ETF Board of any meaningful "authority to maintain proper actuarial funding of the Wisconsin retirement system."

2. The Wisconsin Supreme Court's decision herein suggest that the financial success of the WRS justifies the use of the assets of the WRS to pay for non-trust obligations. App. 57, ¶ 121, 75, ¶ 176; WEAC's brief at 3, 13.[2] Respondents urge that so long as a taking from the

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[2] The Brief in Oppostion filed by the Wisconsin Education Assocation Council will be referred to as "WEAC's brief." The Brief in Opposition filed by George Lightbourn, et al. shall be referred to as the "State's brief."

Trust Fund does not, of itself, render the WRS unable to pay benefit commitments, that such taking thereby becomes lawful. State's brief at 23, 25, WEAC's brief at 5, 12. It is undisputed that employer required contributions are the sole obligation of participating employers, and that the sole purpose of the $200 Million credit is to make these required payments on behalf of participating employers. There is also no dispute that participating employers have no property interest in the assets contained in the WRS, and that these assets are held in "trust" *solely* to fund pension benefits for WRS participants. If the money in the WRS does not belong to the participating employers, it can only belong to the beneficiaries of the trust. It certainly cannot be diverted and used for the benefit of participating employers without violating the takings clause of the United States Constitution. The financial capacity of a condemnee has never been a factor in takings cases, and the Wisconsin Supreme Court erred in considering the financial condition of the WRS in determining whether Act 11 unlawfully takes assets belonging to WRS participants.

In any event, the method by which employer contribution rates are determined already considers the financial success of the WRS as the key determining factor in setting contribution rates, and such financial success has already been factored into the employer contribution rates established by the WRS actuaries. The WRS actuaries determined that employer contributions *are needed* and set those amounts in accordance with Chapter 40.

3. Respondents contend that the $200 Million credit account established by Act 11 does not take Petitioners' property because "application of the credit does not negate the employers' obligation to provide sufficient

funding to meet WRS benefit commitments." State's brief at 7, WEAC's brief at 4, App. 74, 75. The Respondents argue that if additional contributions are required in the future, the participating employers will be obliged to pay them. This argument fails for several reasons. First, since 1989, § 40.05(2n), Stats. has provided that when any increase or decrease in contribution rates is necessary to maintain the financial balance of the WRS, any such change is to be apportioned ***equally*** between the employer-required contribution rate and the benefit adjustment contribution rate paid by participating employees. App. 111, ¶ 26. Thus, any subsequent increase(s) in contribution rates will be split evenly between employers and employees, and participants will have to pay 50% of that increase.

Similarly, any decrease in contribution rates that would be attributable to the $200 Million having remained in the Employer Accumulation Reserve (and earnings thereon) instead of being consumed as a credit pursuant to Act 11, would be a savings shared equally with Participating Employees. Thus the cost of the credit is being shifted, in part, to participating employees. App. 111, ¶ 26. Respondents freely admit that the $200 Million will result in a reduction in contribution rates, and Petitioners (and other participants) are being denied their 50% share of these savings in contribution rates. State's brief at 17.

Even to the extent that a shortfall in WRS funding is ultimately required to be "made up" by participating employers, this "make-up" obligation does not justify the employer credit provisions of Act 11. Respondents' contention amounts to a claim that trust funds held for the sole benefit of WRS participants may be borrowed on an

interest free basis and replaced with an IOU from the State of Wisconsin without violating the takings clause of the Federal Constitution. It also amounts to a claim that the WRS may be converted from a funded to an unfunded pension system without depriving WRS participants of their vested property rights. Chapter 40 of the Wisconsin Statutes creates a funded pension system supported by actuarially determined contribution rates. It does not contemplate or permit the conversion of the WRS into an unfunded pension system, and does not permit the assets of the system to be converted or borrowed for purposes of State budgetary relief. Indeed the terms of the trust do not permit any use of the funds other than paying for benefits and the administration costs of the trust at the lowest possible cost.

4. Respondents suggest that the changes imposed by Act 11 are prospective in nature, and are therefore expressly permitted by Section 40.19(1), Wis. Stats. State's brief at 10. This is simply not true. The $200 Million Credit account does not represent a prospective change. The assets being diverted are those already deposited in the WRS as compensation for services rendered *in the past* by WRS participants. Employer contributions are not prospectively eliminated, limited, or modified by Act 11. Rather, Act 11 uses assets belonging to the WRS to pay a continuing obligation of participating employers, and thereby effectively returns some of the assets contained in the WRS to the coffers of participating employers. The assertion that the government helping itself to a credit funded by the property of others is different than taking the property of others is pure nonsense.

5. Respondents and the Wisconsin Supreme Court characterize Petitioners' position as one which argues for

a "right 'to maintain some operating procedure in the WRS that had existed during a period that the participant was rendering service.' " State's brief at 11, App. 53, ¶ 111. Petitioners are not requesting protection for "some operating procedure." The very substantial assets contained in the WRS are property, and that property belongs to WRS participants. Removing the property of WRS participants from the trust – whether directly or by the indirect method of setoff – and using it to pay financial obligations of participating employers constitutes a taking of property in violation of the United States Constitution. It is not merely a matter of protecting a procedure.

6. Under Wisconsin law, the legislature is not free to spend or appropriate the assets or earnings of the WRS except in a manner and for the purposes specifically authorized by the contractual terms reflected in the statutes relating to the WRS. *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 558-59, 544 N.W.2d 888, 892 (1996); *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960). Under the WRS contract, the assets contained in the employer accumulation reserve are to be used solely to purchase annuities for retiring participants. § 40.04(5), Stats., *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 556, 544 N.W.2d 888, 890 (1996).

The Wisconsin Supreme Court, and each of the Respondents, contend that the WRS contract authorizes the use of the assets and earnings contained in the employer accumulation reserve to pay for employer obligations to the trust fund for unfunded liabilities and required employer contributions because the credit account satisfies the general statutory requirement that

benefit commitments to participants be fulfilled "at the lowest possible cost." State's brief at 11, 46, WEAC's brief at 47-48. This reasoning was adopted by the Wisconsin Supreme Court, and is plainly erroneous for several reasons. App. 55, ¶ 115.

Section 40.01, Stats. requires trust funds to be used "**solely** for the purpose of ensuring the fulfillment at the lowest possible cost of the **benefit commitments to participants, *as set forth in this chapter***." (emphasis added). Clearly, the purpose of this language is to ensure that trust fund assets are expended as efficiently as possible in satisfying benefit commitments to participants. This requirement serves the dual purpose of ensuring the efficient management and use of WRS assets, while at the same time ensuring that WRS assets are not shifted to third parties through the satisfaction of benefit commitments at inflated rates.

The employer credit account uses trust assets in a manner not "set forth in this chapter [(chapter 40)]". The general requirement that benefit commitments be fulfilled "at the lowest possible cost" does not expand the permissible use of trust fund assets beyond those purposes expressly authorized by the WRS Contract. The employer credit account may lower costs for participating employers, but this will always be the case when the obligations of participating employers are shifted to the corpus of the trust fund or to participants. The phrase lowest possible cost is certainly not a license to reduce cost to employers by allowing them to cannibalize the trust fund by raiding the corpus of the trust.

7. The bottom line issue in this case is who is the beneficial owner of the trust funds in the WRS, and the decision of the Wisconsin Supreme Court conspicuously

avoids this issue. A long line of cases makes it clear that the beneficial interest to those funds belong solely to the beneficiaries of the trust. *See* Petition at 19-22. These cases have also made it clear that participating employers have no right to remove funds from the trust. The use of a "credit" funded by the assets of the trust is a ruse that can only be supported with sophistry, and does not constitute a legitimate basis for the disavowal of well established property rights.

8. The Wisconsin Supreme Court suggests that if, in the future, the $200 Million credit causes the contribution rates of participants to increase "they may renew the argument that the balance in the fund would have been greater if there had been no employer credits." App. 77. Notably, the Wisconsin Supreme Court does not retain jurisdiction over this case, and does not suggest that the limitations period for filing an action based on the $200 Million credit provision of Act 11 is extended. The contribution rates for pension systems are based on very extended time lines, and it is not clear when the impact of the $200 Million credit will be felt. However, *any* future increase in contribution rates will be attributable, at least in part, to the fact that $200 Million has been removed from the WRS by Act 11.

9. Respondents contend that there is no conflict among the State court decisions cited by Petitioners. Pension systems are inherently complex, and vary in structure from state to state. This does not change the fact that all funded public pension systems face the common issue of who has beneficial ownership of the system's assets, and whether a state legislature may dip into the those assets as a source of budgetary relief without violating the takings clause of the federal constitution or violating

vested contractual rights of plan participants. The conflicting state court decisions in this regard have been duly noted by legal scholars, and are rooted in the fundamental dispute over participants' property rights in the underlying assets of their pension system. *A Skunk at a Garden Party: Remedies for Participants in State and Local Pension Plans*, 79 Denv. U.L. Rev. 507 (1998), *Public Employee Pensions in Times of Fiscal Distress*, 90 Harv.L.Rev. 992 (1977).

II. CONCLUSION

For all the foregoing reasons, the Petition for Review should be granted.

Respectfully submitted,

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